

AN EXPLORATION OF STUDENT-TO-STUDENT SEXUAL HARASSMENT
AS SEX DISCRIMINATION IN HIGHER EDUCATION THROUGH
ANALYSIS OF APPROPRIATE STATUTES AND CASE LAW

By

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Amy Milford Abernethy

To my mother and father, Mema and Bebop,
Greg and Christine, Scott and Tracie,
James, Michael and my husband, John

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Abstract of Dissertation Presented to the Graduate School
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Major Department: Educational Leadership

The purpose of this study was to examine existing sexual harassment statutes to determine if any of them provide a legal remedy to victims of student-to-student sexual harassment in higher education institutions. If current legal statutes were found not to extend such a remedy, a second purpose was to explore the expansion of present legal theories affording protection against sex discrimination of students to include student-to-student sexual harassment, especially through the use of Catharine MacKinnon's theories of dominance, inequality and sexual harassment as a form of sex discrimination.

The legal analysis revealed that the substantive case law concerning Title IX has expanded as knowledge of the sociological ramifications of sexual harassment have

surfaced. The law of sexual harassment has been extended to the educational setting including remedies for sexual harassment of students by professors or administrators. It is also clear that sexual harassment by peers in the workplace is remediable. Therefore, a remedy for student-to-student sexual harassment could well be the next step of protection provided by federal law, if the courts wish to take it.

An analysis of numerous cases has shown that some courts have adopted MacKinnon's theories of dominance, inequality and sex discrimination when deciding sexual harassment cases. The theoretical basis for an expansion of Title IX through case law is available to courts who are so inclined to use it through MacKinnon's theories.

It was recommended that further research be conducted including more recent Title IX cases to determine if such an expansion in case law has occurred. It was suggested that additional research be conducted concerning the increasing tension between the civil rights guaranteed under Title IX to be free from sex discrimination and the First Amendment right to free speech.

CHAPTER I
INTRODUCTION

The Background of the Study

Incidents of sexual harassment among students are increasing on college campuses.¹ Hughes and Sandler have described various scenarios of sexual harassment perpetrated by male students against female students on college campuses every day.²

-As women walk through a cafeteria line, men sit at a table and "rate" them as they go by and as a result, women begin to skip meals to avoid the cafeteria.³

-As part of a prank, a fraternity pledge bites a woman on the breast--a practice among some fraternities called "sharking."⁴

-A group of men crowd around a woman at a party and expose themselves.⁵

¹ Linda Haviland, "Student Discriminatory Harassment," Journal of College and University Law 16, no. 2 (1989): 311.

² Jean O'Gorman Hughes and Bernice R. Sandler, Peer Harassment: Hassles for Women on Campus, Washington, D.C.: Project on the Status and Education of Women (September, 1988): 1.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

While the above examples are exceedingly blatant forms of sexual harassment, it also exists in more subtle forms. For example, each time a woman raises her hand to answer a question in class, the men lean back in their chairs as if disinterested, watch the clock, and snicker among themselves. Soon, the women stop participating in class altogether.

Student-to-student sexual harassment, a subcategory of peer harassment, covers a wide range of behaviors which range from sexual remarks and jokes to the most explicit form of sexual harassment, sexual assault;⁶ and while seemingly unrelated, these acts may be part of a pattern of behavior exhibited by college-age males.⁷ Hughes and Sandler assert that student-to-student sexual harassment can corrupt the college experience for women because of the profound effect it has on the atmosphere where learning is supposed to take place, making the education of women on campus "less than equal."⁸ Student-to-student sexual harassment can interfere with the victim's accessibility to facilities such as the classroom, the college library and a student's residence hall environment, which she is entitled

⁶ Ibid.

⁷ Ibid., 2.

⁸ Ibid.

to use, enjoy and benefit from.⁹ According to Jones, these discriminatory experiences constitute a legal harm that should be prohibited.¹⁰

While it seems logical to suggest that individuals who suffer an injury through the actions of others should be able to seek a civil remedy, one of the legal dilemmas stemming from student-to-student sexual harassment is the judicial system's perception, to date, of what actions constitute a legally recognizable harm and what actions do not. In other words, a student may feel she was discriminated against because she was sexually harassed by a classmate and the institution did nothing to prevent the harassment. However, if there is no judicial remedy available for this type of harassment, the harassed student's claim for damages will not be sustained by a court of law. Yet the lack of a remedy for a perceived offense is not the only obstacle surrounding the issue of recovery for the harm suffered by student-to-student sexual harassment.

Dissimilar views between men and women about what constitutes sexually harassing behavior and whether or not it should be considered a legal harm is another difficulty. Differences in perceptions concerning harassing behavior can

⁹ Charles H. Jones, "Equality, Dignity and Harm: The Constitutionality of Regulating American Campus Ethnoviolence," The Wayne Law Review 37 (1991): 1416.

¹⁰ Id.

be illustrated through the research of Dietz-Uhler and Murrell indicating that male and female colleagues differ in their attitudes toward sexual harassment.¹¹ While women are more inclined to see certain behaviors as sexual harassment and label a wider variety of behaviors as sexual harassment, men are more likely to believe that the issue of sexual harassment has been exaggerated by the media and are more likely to blame women for being sexually harassed.¹²

Title VII of the Civil Rights Act of 1964¹³ and Title IX of the Educational Amendments of 1972¹⁴ are the two major federal statutes that address sexual harassment in higher

¹¹ Beth Dietz-Uhler and Audrey Murrell, "College Students' Perceptions of Sexual Harassment: Are Gender Differences Decreasing?" Journal of College Student Development 33 (November 1992): 540.

¹² Ibid.

¹³ 42 U.S.C. § 2000e-2(a)(1). Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice to "...discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

¹⁴ 20 U.S.C. § 1681(a). Title IX states in part:

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational, training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

education institutions.¹⁵ Although the Equal Employment Opportunity Commission (EEOC), the administrative office assigned the task of enforcing Title VII, has devised a set of guidelines for the implementation of Title VII in the workplace including a protocol in the event that sexually harassing behavior occurs, no judicial or administrative guidelines have been developed under Title IX regarding student-to-student sexual harassment.¹⁶ Lack of specific guidelines, such as those available for Title VII, makes the task of identifying and prohibiting student-to-student sexual harassment on the college campus all the more difficult.

Failure to promulgate guidelines such as those established in the case of Title VII may be explained by several factors. First, because students are transitory, unlike employees, their interest in institutional reform may

¹⁵ Ronna G. Schneider, "Sexual Harassment and Higher Education," Texas Law Review 65 (1987): 526.

¹⁶ 29 C.F.R. sec. 1604.11 (a) (1980). The EEOC Guidelines state:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to, or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

be short-term, while the actual litigation may last longer than their tenure at the institution.¹⁷ Second, education, unlike employment, ordinarily involves benefits to the student that are more long range than immediate and so a student may have a more difficult time proving a loss of benefit when the benefit is not so readily apparent.¹⁸ Third, courts have been reluctant to challenge decisions made by academic institutions.¹⁹

Although the Office for Civil Rights (OCR) at the U.S. Department of Education (DOE) has interpreted Title IX to prohibit student-to-student sexual harassment, the OCR has not issued any formal statements concerning student-to-student sexual harassment, or even when an educational environment becomes "hostile."²⁰ Yet it may be possible to analogize that a student's environment becomes hostile when

¹⁷ Schneider, "Sexual Harassment," 527.

¹⁸ Id. at 528.

¹⁹ Id.

²⁰ "Department of Education Takes On Peer Harassment," About Women on Campus 2, no. 3 (Summer, 1993): 8.

A letter dictated by OCR on April 27, 1993, found discrimination in the case of young boys sexually harassing girls on a school bus. Interestingly, OCR's letter stated that the relatively young age of the students involved did not alter the legal responsibility of the school "...to prevent sexually offensive behaviors that 'are sufficiently severe or pervasive to impair the educational benefits offered' by the school." The mention of the students' ages seems to indicate that the legal responsibility of an educational institution is more explicit in cases where the students are older.

that student is impaired in her studies due to harassing behavior and she fails to receive the academic benefit to which she is entitled, similar to how the EEOC defines a hostile environment in the workplace.²¹ Even without the force of law, however, some college campuses are taking it upon themselves to establish codes of conduct for their student bodies that address the issue of sexual harassment and, in particular, student-to-student sexual harassment.²² This would seem to indicate that college campuses are seeing

²¹ Schneider, "Sexual Harassment," 536.

²² The sexual harassment policy at Lyndon State College (1993) in Vermont forbids all members of the campus community from engaging in actions which intimidate, humiliate, or undermine the self-esteem of other persons on the campus. The policy also explains that conduct which is disturbing to one person might not be disturbing to another and members of the campus community should remain conscious of this fact. The policy states in part:

In the academic context, sexual harassment includes a wide range of behavior between students [emphasis added], between employees, or between students and employees. . . . For . . . students, the reference to 'employment' or 'work' in the EEOC guidelines includes the entire range of academic and nonacademic functions of the college community.

While the sexual harassment policy at Northwestern University (1993) does not specifically mention student-to-student sexual harassment as does the Lyndon State policy, its policy is broad enough to infer a prohibition against student-to-student sexual harassment. The policy reads in part:

Northwestern University is committed to a campus environment free from all forms of coercion that impede the academic process and may infect the lives of those who work, study, and live here. This commitment includes the prevention--and, where it occurs, the punishment--of gender-based misconduct such as sexual harassment and sexual assault.

a definite need to proscribe certain conduct which might be perpetrated by one student or a group of students against another student or groups of students.

Although there is currently no case law that addresses the issue of student-to-student sexual harassment in higher education institutions, should a suit be brought by a student, it is most likely that the student would choose to bring the action under Title IX of the Education Amendments of 1972 since it specifically addresses sex discrimination against students on campus.²³ Alexander v. Yale University²⁴ was the first time a plaintiff brought a sexual harassment suit against a university alleging a violation of Title IX and, in that decision, the appellate court held that quid pro quo sexual harassment was legally actionable in educational settings.²⁵

In Alexander, however, the appellate court ruled on the actionability of sexual harassment between a faculty member and a student where the power structure was readily apparent. In instances of student-to-student sexual harassment, the hierarchical relationship is not as clearly visible. Although victims may be recognized by their decreased participation in student activities or changed

²³ 20 U.S.C. sec. 1681(a).

²⁴ 459 F.Supp. 1 (D.Conn. 1977); aff'd 631 F.2d 178 (2d Cir. 1980).

²⁵ Id. at 184.

career paths, the legal system fails to dignify these resulting behaviors as recognizable harm under law by failing to identify student-to-student sexual harassment as sex discrimination prohibited by Title IX. Not recognizing this harm sends the message that, under the law, these women are not equal persons, entitled to the same learning environment where male students prosper. According to Schneider:

The court's refusal to recognize maintenance of an offensive educational environment as sexual harassment under Title IX ignores a critical element of learning in any academic institution--the creation and fostering of an environment conducive to intellectual growth. The academic environment existing at an educational institution is extremely important in determining the benefit that a student receives from attending that institution. Any diminution or pollution of that academic environment is, therefore, a reduction in the educational benefit that the student receives.²⁶

The Theoretical Framework of the Study

Ultimately the actionability of sexual harassment as sex discrimination in any setting turns on whether there is an abuse of power in a relationship.²⁷ The theories of dominance and inequality first proposed by legal scholar Catharine MacKinnon capture the subtle power differences between men and women that provide the basis for student-to-student sexual harassment.²⁸ MacKinnon uses the dominance

²⁶ Schneider, "Sexual Harassment," 540.

²⁷ Id. at 534.

²⁸ Christine A. Littleton, "Equality and Feminist Legal Theory," University of Pittsburgh Law Review 48 (1987): 1045-47.

theory to characterize the period of judicial reasoning influenced by the dominant gender in society, the male gender.²⁹ The dominance theory addresses those forms of injustice that arise from the devaluation of anything associated with women, or from the identification of women with anything that is devalued, disaffirmed or disempowering.³⁰ MacKinnon offers a legal argument against the biases of the "dominance" reality of the judicial system through her theory of inequality which contends that the social inequality of the sexes should not justify different legal treatment that subordinates one sex to another.³¹

Colker concurs with MacKinnon that it is inappropriate for certain groups in society to have subordinated status

It may be useful to view the body of feminist legal theory as . . . interrelated. . . . First, theories of sex discrimination address those forms of inequality that arise from irrational prejudices against women in public arenas, as well as the unjustified stereotypes used to exclude women from employment and other areas of social life.

Second, theories of gender oppression address those forms of inequality that arise from the restriction of women to particular social roles defined somehow as "theirs." Theories of gender oppression focus on the restriction of women into particular roles. There is strong evidence that skills associated with women, or that come in combinations that appear to be associated with women, are systematically devalued on that basis.

²⁹ Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (New Haven: Yale University Press, 1979): 5.

³⁰ Littleton, "Feminist Legal Theory," at 1046.

³¹ MacKinnon, Sexual Harassment, 4-5.

because of their lack of power in society as a whole.³² Therefore, these legal theorists endeavor to expose the uneven power structure that has existed throughout history and eliminate the power disparities between women and men through the development of laws and policies that directly redress those disparities.³³

According to MacKinnon, it is the African-American experience that has shaped the concept of discrimination, racial, sexual or otherwise, emerging as a response to the demands of African-Americans for legal equality as a means to achieving social equality.³⁴ Yet, as evidenced in the

³² Ruth Colker, "Anti-Subordination Above All: Sex, Race and Equal Protection," N.Y.U. Law Review 61 no. 6 (1986): 1007.

³³ Id.

³⁴ Catharine A. MacKinnon, Sexual Harassment, 127-28.

This focus has been both crucial to the law's growth and limiting. When no ready analogy exists between race-based abuse and a sex-based one, as in pregnancy or sexuality, courts have often seemed at a loss. In sharp contrast to the best moments of the courts' approach to racial differences, the socially based, systematic character of the observable differences between the sexes has been neither recognized nor investigated. Judges have become conscious of many attitudes and practices as unquestionably racist which are allowed to persist in their corresponding sexist forms. No Supreme Court justice would take judicial notice that Blacks were "better at" being slaves than whites, outside an awareness of the social context which made slavery a virtually exclusive life option. In reaching this perspective on race, courts did not stop perceiving that racial difference exists. They simply began to view these differences, to the extent that Blacks were disadvantaged by them, as the results of racism. Differences that derived from social deprivation were no longer acceptable reasons for

case of Sumner v. Goodyear Tire & Rubber,³⁵ the legal system has been slower to recognize harm from sex discrimination than from race discrimination. In Sumner, the Michigan Supreme Court, in deciding the applicability of continuing violation in a state action, found no nexus between a woman's deteriorated work abilities and sexual harassment, but conversely, related an African-American worker's aggravated assault and battery on a supervisor to racial harassment.³⁶ As Love asserts:

Must a defendant have to repeatedly utter demeaning sexual epithets before it rises to the level of extreme and outrageous conduct? Why is it legally actionable to call a black man a "nigger," but not actionable to call a black woman a "black bitch" or a "cavern cunt"? Are not isolated sexual epithets every bit as degrading as isolated racial or ethnic epithets? Surely these sexual epithets cause the same type of adverse impact on the victim's sense of self-esteem, and they reinforce the same types of historical patterns of oppression as racial and ethnic epithets.³⁷

Brown v. Board of Education,³⁸ the 1954 Supreme Court case which, in effect, desegregated public schools,

inequality, but symptoms of it. This view has not been uniformly embraced by the legal system; it may not survive. But the approach to race which set the terms of discourse, at least since the school desegregation cases in 1954, illustrates and befits an inequality approach. An analogous approach has not been taken--and needs to be--to the equality of women.

³⁵ 398 N.W.2d 368 (Mich. 1987).

³⁶ Id. at 683.

³⁷ Jean C. Love, "Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress," Washington and Lee Law Review 47 (1990): 140.

³⁸ 347 U.S. 483 (1954).

articulated a new standard of equality applicable to campus discrimination based on race.³⁹ The reasoning behind Brown was based on social evidence that claimed existing segregation in schools subordinated and stigmatized members of minority groups with a "badge of slavery,"⁴⁰ causing their withdrawal from participation in the enjoyment and governance of academic institutional life.⁴¹

Just as racial discrimination is rooted in unequal power, sex discrimination is rooted in unequal power too, specifically of male supremacy and female submission.⁴² MacKinnon has stated that the dominance theory was the implicit model for racial justice applied by the courts

³⁹ Jones, "Equality, Dignity and Harm," 1396.

⁴⁰ See, Mark Whitman, ed., Removing a Badge of Slavery: The Record of Brown v. Board of Education (New York: Markus Wiener Publishing, Inc., 1993).

⁴¹ Jones, "Equality, Dignity and Harm," 1396. See also, Charles Lawrence, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," Duke Law Journal (1990): 431. In his article, Professor Lawrence writes that Brown is central to understanding the equal protection clause because it recognizes the principle that ". . . every individual is presumptively entitled to be treated by the organized society as a respected, responsible participating member." See also, Jones, "Equality, Dignity and Harm," 1405. Jones goes on to add that "government is affirmatively required to disestablish societal practices that treat people as members of an inferior or dependent caste, or as unworthy to participate in the larger community."

⁴² Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and the Law (Cambridge: Harvard University Press, 1987): 40.

during the sixties.⁴³ It was based on the realization that the condition of African-Americans was based on the power whites exerted over them, under which racial differences became objectionable as a consequence.⁴⁴ By criticizing a judicial system influenced by the dominant male culture through her theory of inequality, MacKinnon hopes that discrepancies in legal remedies based on sex will eventually become objectionable.⁴⁵ For as MacKinnon herself stated:

There came a time in Black people's movement for equality in this country when slavery stopped being a question of how it could be justified and became a question of how it could be ended. Racial disparities surely existed, or racism would have been harmless, but at that point--a point not yet reached for the issues of sex--no amount of group difference mattered anymore. This is the same point at which a group's characteristics, including empirical attributes, become constitutive of the fully human, rather than being defined as exceptions to or as distinct from the fully human. To one-sidedly measure one group's differences against a standard set by the other incarnates partial standards. The moment when one's particular qualities become part of the standard by which humanity is measured is a millennial moment.⁴⁶

The Purpose of the Study

The purpose of this study was to examine existing sexual harassment statutes to determine if any of them provided a legal remedy to victims of student-to-student harassment in higher education institutions. If current

⁴³ Ibid., 42.

⁴⁴ Ibid.

⁴⁵ Ibid., 40.

⁴⁶ Ibid., 44.

legal statutes were found not to extend such a remedy, a second purpose of the study was to explore the expansion of present legal theories affording students protection against sex discrimination to include student-to-student sexual harassment through Catharine MacKinnon's theories of dominance, inequality and sex discrimination.

The research questions addressed were as follows:

1. Sexually harassing conduct by co-workers is prohibited by Title VII of the Civil Rights Act of 1964 because it is sex discrimination. Through the analysis of appropriate federal legislation and federal case law, what argument can be made that student-to-student sexual harassment is sex discrimination which should be prohibited by Title IX of the Education Amendments of 1972?
2. How do MacKinnon's theories of dominance, inequality and sexual harassment as a form of sex discrimination provide the theoretical means necessary to show that student-to-student sexual harassment is sex discrimination that should be prohibited by Title IX of the Education Amendments of 1972?

Justification of the Study

Like rape victims, victims of sexual harassment are often ashamed of their experience because they feel they may have done something to provoke the incident(s), and they may fear retaliation by the perpetrator and so refrain from

telling others or seeking help.⁴⁷ These psychological scars, however, can and do manifest themselves in overt physical symptoms such as gastro-intestinal distress and headaches, for example.⁴⁸ When the harassment occurs in higher education, students have avoided taking certain classes, decided not to participate in certain campus events, and even changed their majors to avoid the harassing behavior.⁴⁹

Currently, the Office for Civil Rights in the Department of Education has not issued Title IX guidelines prohibiting the sexual harassment of students by other students as the Equal Employment Opportunity Commission has done with employees in the workplace under Title VII. However, if the hostile environment created by sexually harassing students makes it difficult for harassed students to learn, the victims are not receiving the "educational benefit" guaranteed by Title IX of the Education Amendments of 1972.⁵⁰ The lack of administrative guidelines for Title IX or the lack of a judicial remedy for victims of student-to-student sexual harassment may send a message that the

⁴⁷ Rosemarie Tong, Women, Sex and the Law (Towowa, N.J.: Rowman & Allenheld, 1984): 65-66.

⁴⁸ Ibid., 66.

⁴⁹ Hughes and Sandler, Peer Harassment, 2-3.

⁵⁰ Ibid., 2.

injury suffered by these victims is not important enough because there is no judicial remedy for their harm.

Method of the Study

A traditional methodology of legal research was employed in this study. An examination of federal laws was made including Title IX of the Education Amendments of 1972 and Title VII of the Civil Rights Act of 1964. Law review articles were analyzed to gain an understanding of the current status of federal statutes addressing student-to-student sexual harassment. The law review articles were used to provide evidence that student-to-student sexual harassment is a serious problem on campus both in its frequency and its detrimental effects. An analysis of relevant court cases addressing sexual harassment that have interpreted federal legislation was made in order to establish and examine the judicial reasoning of the courts in these decisions. MacKinnon's theories of dominance, inequality and sex discrimination were applied to the sexual harassment cases analyzed in this study to determine whether a legal basis could be provided for the proposition that student-to-student sexual harassment in the higher education setting is a form of sex discrimination that should be prohibited by Title IX of the Education Amendments of 1972.

Definition of Terms

Cause of action refers to the fact or facts that give a person the right to judicial redress or relief against another.⁵¹

Damages refers to a pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another.⁵²

Harm refers to the existence of a loss or detriment in fact of any kind to a person resulting from any cause.⁵³

Injury refers to any wrong or damage done to another, either in his person, rights, reputation, or property. The invasion of any legally protected interest of another.⁵⁴

Remedy refers to the means by which a right is enforced or the violation of a right is prevented, redressed, or compensated. The means employed to enforce a right, which is a well-founded or acknowledged claim.⁵⁵

⁵¹ Black's Law Dictionary 6th ed. (St. Paul, Minn.: West Publishing Co., 1990) at 221.

⁵² Id. at 389.

⁵³ Id. at 718.

⁵⁴ Id. at 785.

⁵⁵ Id. at 1294.

Standard of care refers to the degree of care that a reasonably prudent person should exercise in same or similar circumstances. If a person's conduct falls below such standard, he may be liable in damages for injuries or damages resulting from his conduct.⁵⁶

Standing to sue doctrine means that party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. . . . The requirement of "standing" is satisfied if it can be said that the plaintiff has a legally protectible and tangible interest at stake in the litigation.⁵⁷

Limitations of the Study

1. Many educators believe the university has a responsibility for maintaining a campus environment conducive to learning and support the university's attempt to proscribe restrictions for some forms of speech believed to be detrimental to an effective learning environment.⁵⁸ However, this study does not debate the legality of First Amendment restrictions on the college campus other than stating that the First Amendment is by no means an absolute right, even on a college campus.⁵⁹

⁵⁶ Id. at 1404-05.

⁵⁷ Id. at 1405.

⁵⁸ Jones, "Equality, Dignity and Harm," 1384.

⁵⁹ Henry W. Saad, "The Case For Prohibitions of Racial Epithets in the University Classroom," The Wayne Law Review 37 (1991): 1351-62 quoting Professor Tribe:

2. Although there are reported cases of females harassing males both in the workplace and on campus, this study focuses on male students harassing female students.

3. This study focuses on existing federal legislation and federal case law addressing sexual harassment and sex discrimination. Relevant state statutes or state cases are not discussed.

4. This study analyzes only applicable case law that has been decided since the passage of the Education Amendments of 1972 up to and including the 1993 calendar year.

Organization of the Study

Chapter I provides an introduction and overview of the study. The purpose of the study and research questions are presented.

In Chapter II a review of the literature is conducted to provide the background for the rationale of the study and to examine the theoretical base upon which it is grounded. A review of the federal legislation which addresses sexual

The first amendment need not sanctify the deliberate infliction of pain simply because the vehicle used is verbal or symbolic rather than physical. Id. at 1352.

When free speech conflicts with an equally important principle--where two rights collide--a priority must be determined: "The free speech principle is important in all cases within its scope, but it is only necessarily more important in all cases where no identifiable individual right is present on the other side of the balance." Id. at 1354.

harassment in the workplace and in the higher education setting is provided along with appropriate case law which interprets the statutory language. MacKinnon's theories of dominance, inequality and sex discrimination are also discussed to provide evidence of the existence of a power relationship between male and female students, despite their "peer" status.

Chapter III describes the methodology of the study. The traditional methodology of legal research is explained; data collection for federal legislation and applicable case law is addressed; MacKinnon's theories of dominance, inequality and sex discrimination are applied to the data gathered; and the standards of adequacy for legal research are also discussed.

Chapter IV provides an analysis of the data. Chapter V is an examination of the data in conjunction with MacKinnon's theories of dominance, inequality and sex discrimination to determine whether similar reasoning was taken into consideration by the courts when forming their judicial opinions. The judicial system's acceptance of the legal arguments presented in MacKinnon's theories may provide the legal basis for a judicial expansion of Title IX to include student-to-student sexual harassment as a prohibited violation.

Chapter VI contains conclusions about the research topic along with recommendations for further study.

CHAPTER II LITERATURE REVIEW

A review of the literature addressing sexual harassment and, in particular, student-to-student sexual harassment furnished the background of this study. This review focused on several major areas: the definition of student-to-student sexual harassment; the response to the problem of student-to-student sexual harassment through legislation and subsequent case law; MacKinnon's theory of sexual harassment as sex discrimination;¹ and MacKinnon's theories of dominance and inequality explaining the existence of power imbalances between men and women in society providing evidence that student-to-student sexual harassment is sex discrimination.

The Legal Status of Student-to-Student Sexual Harassment

Rubin and Borgers estimated that at least one-third of all female college and university students are harassed on campus.² The existence of student-to-student sexual

¹ See generally, Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (New Haven: Yale University Press, 1979).

² See, Linda J. Rubin & Sherry B. Borgers, "Sexual Harassment in Universities During the 1980's," Sex Roles 23, (Oct. 1990): 397-412; Billie Wright Dzeich & Linda Weiner, The Lecherous Professor: Sexual Harassment on Campus, 2nd. ed. (Chicago: University of Illinois Press, 1990). (Twenty to thirty percent of female college students

harassment on campus sends a harmful message to all students that it is permissible to sexually objectify women which gives male students an unequal advantage over female students on campus.³ Student-to-student sexual harassment on the college campus can have long term effects that are both professional and personal. The harassing behavior experienced in predominantly male-dominated majors may dissuade women from pursuing those career paths thereby ensuring that such fields remain male-dominated.⁴ Perhaps even more unfortunate, allowing student-to-student sexual harassment to continue unbridled on a college campus can provide an atmosphere in which the most overt form of sexual harassment--date rape--can be committed without fear of penalty.⁵

The failure of the Higher Education Act of 1965⁶ to address the issue of sex discrimination against students led to the subsequent passage of Title IX of the Education

experience sexual harassment often with severe psychological and educational impact).

³ Jean O'Gorman Hughes and Bernice R. Sandler, Peer Harassment: Hassles for Women on Campus, Washington, D.C.: Project on the Status and Education of Women (September, 1988): 2.

⁴ Ibid.

⁵ Terry Nicole Steinberg, "Rape on College Campuses: Reform Through Title IX," Journal of College and University Law 18 (1991): 52-53.

⁶ Pub. L. No. 89-329, 1965 U.S.C. sec. 1230.

Amendments of 1972.⁷ The pertinent language of Title IX, which parallels Title VI of the Civil Rights Act of 1964 except for use of the word "sex" instead of "race" reads:

No person in the United States shall, on the basis or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal assistance.⁸

Title IX requires that colleges and universities receiving federal funding establish policies prohibiting sexual harassment and procedures for redress if a complaint by a student should be brought.⁹ While some colleges and universities do assume the responsibility of trying to regulate student-to-student sexual harassment through prohibitions in student codes of conduct, inclusion of sexual harassment policy in such codes is not required under any federal law.¹⁰ This being the case, students cannot be assured that their particular institutions will provide such prohibitions in their student codes of conduct or that the

⁷ 20 U.S.C. sec. 1681(a).

⁸ Id.

⁹ Jollee Faber, "Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment," UCLA Women's Law Journal 2, no. 1 (Spring 1992): 106.

¹⁰ Dziech and Weiner, The Lecherous Professor, 203-20 (referring to the institutional policies of the University of Minnesota and Gettysburg College).

redress for the perpetration of the harassment will be satisfactory to the victim.¹¹

A multitude of reports have suggested the procedures that address student-to-student sexual harassment on campus today are insufficient.¹² Strauss wrote that a school district has a responsibility to respond in a "timely and increasingly aggressive manner to investigate and remedy manifested sexual harassment and to affirmatively act to halt continuing sexual harassment."¹³ Similarly, campus administrators and faculty members believe that a college or university has the responsibility to maintain an environment on campus which is free from harassment and encourages

¹¹ Faber, "Expanding Title IX," 106.

¹² See, Claire Robertson, Constance E. Dyer, and D'Ann Campbell, "Campus Harassment: Sexual Harassment Policies and Procedures at Institutions of Higher Learning," Signs: Journal of Women in Culture and Society 13, no.4 (Summer 1988): 792-812.(study of sexual harassment policies in place at large universities show them to be largely ineffective); Bernice R. Sandler, The Campus Climate Revisited: Chilly for Women Faculty, Administrators, and Graduate Students, Washington, D.C.: Project on the Status and Education of Women (1986); Roberta M. Hall & Bernice R. Sandler, The Classroom Climate: A Chilly One for Women? Washington, D.C.: Project on the Status and Education of Women (February, 1982).

¹³ Joann Strauss, "Peer Sexual Harassment of High School Students: A Reasonable Student Standard and an Affirmative Duty Imposed on Educational Leadership," Law & Inequality 10 (June 1992): 5.

students to learn through their full participation in campus life.¹⁴

Added to the absence of explicit prohibitions of student-to-student sexual harassment in any formal institutional document, administrators and faculty members are reluctant to invade students' private lives, especially with the decreased availability of the in loco parentis doctrine as an excuse for doing so.¹⁵ These administrators are apprehensive about incorrectly characterizing an incident as sexual harassment when it may be nothing more than "normal social adjustment."¹⁶

Despite the ambiguous nature of Title IX of the Education Amendments of 1972 regarding its explicit and implicit prohibitions, school law scholars predict that Title IX will increasingly become the choice of the victims of student-to-student sexual harassment seeking a remedy for the harm they have suffered.¹⁷ Courts that have interpreted sex discrimination statutes and, in particular, Title IX of the Education Amendments of 1972 have consistently

¹⁴ Charles H. Jones, "Equality, Dignity, and Harm: The Constitutionality of Regulating American Campus Ethnoviolence," The Wayne Law Review 37 (1991): 1384.

¹⁵ Rosemarie Tong, Women, Sex and the Law, (Towowa, N.J.: Rowman & Allenheld, 1984): 85.

¹⁶ Ibid.

¹⁷ Robert M. Hendrickson, Barbara A. Lee, Frederick D. Loomis, and Steven G. Olswang, "The Impact of the Civil Rights Restoration Act on Higher Education," Education Law Reporter 60 (August 1990): 678.

prohibited quid pro quo--"this for that"--sexual harassment despite the fact that quid pro quo sexual harassment is not mentioned in the statute.¹⁸

However, because student-to-student sexual harassment is more akin to hostile environment sexual harassment than quid pro quo harassment, due to students' lack of legitimate authority over other students,¹⁹ it is important to first determine whether a student can bring a hostile environment claim in a higher education setting. As Faber and Wetherfield have intimated, it seems reasonable to suppose that Title IX of the Education Amendments of 1972 prohibits both quid pro quo and hostile environment sexual harassment just as Title VII prohibits both types of harassment despite the failure to mention those specific types of harassment in either statute.²⁰

¹⁸ See Alexander v. Yale Univ., 459 F.Supp. 1, 3 (D.Conn. 1977), Alexander v. Yale Univ., 631 F.2d 178, 184 (2d Cir. 1980); Bougher v. University of Pittsburgh, 713 F.Supp. 139, 145 (W.D. Pa. 1989), aff'd, 882 F.2d 74 (3d Cir. 1989).

¹⁹ Faber, "Expanding Title IX," 91.

²⁰ See generally, Faber, "Expanding Title IX." See also, Alison Wetherfield, "Sexual Harassment: The Current State of the Law Governing Educational Institutions," Initiatives 52, no. 4 (Winter 1990): 23, 26.

Occurrences of Student-to-Student Sexual Harassment on the College Campus

College-age men and women differ in their sexual expectations and perceptions.²¹ For example, Abbey concluded that men often interpret women's friendliness as evidence of sexual interest.²² Cited studies show that college-age men are more likely to subscribe to out-dated beliefs about sexual harassment and appear to coincide with the increasing reports of harassing and assaultive behavior on campus.²³ One group of researchers found that sexually aggressive college men are more likely to condone sexual harassment and say that they might sexually assault a woman if they could be assured they would not get caught.²⁴

Similarly, female students are more likely than male students to label certain behavior as sexual harassment, and women categorize a greater number of behaviors as

²¹ Antonia Abbey, "Sex Differences in Attributions for Friendly Behavior: Do Males Misperceive Females' Friendliness?" Journal of Personality and Social Psychology 42, no.5 (May 1982): 830; Donna J. Benson and Gregg E. Thomson, "Sexual Harassment on a University Campus: The Confluence of Authority Relations, Sexual Interest and Gender Stratification," Social Problems 29, no.3 (February 1982): 236; Dietz-Uhler and Murrell, "Perceptions of Sexual Harassment," 540.

²² Abbey, "Do Males Misperceive Females' Friendliness," 836.

²³ Mary Ellen Reilly, Bernice Lott, Donna Caldwell, and Luisa DeLuca, "Tolerance for Sexual Harassment Related to Self-Reported Sexual Victimization," Gender and Society 6, no.1 (March 1992): 133.

²⁴ Ibid., 135.

harassing.²⁵ This finding may be due to the fact that women are more likely than men to become victims of sexual harassment or assault at some point in their lives.²⁶

Therefore, the sexually harassing behavior inflicted upon one student by another often results from miscommunication between the sexes that has very deep roots. Abbey wrote that women are socialized to "play hard to get" and are expected to say "no" even when sexually attracted to a man.²⁷ Similarly, men are socialized to believe that women want a sexually aggressive partner who is the initiator of sex.²⁸

An understanding of the social and psychological roots of sexual harassment is necessary in order to construct effective sexual harassment policies that not only punish offenders, but educate potential harassers and thwart the harassment before it occurs.²⁹

²⁵ Beth Dietz-Uhler and Audrey Murrell, "College Students' Perceptions of Sexual Harassment: Are Gender Differences Decreasing?" Journal of College Student Development 33 (November 1992): 540.

²⁶ Ibid.

²⁷ Abbey, "Do Males Misperceive Females' Friendliness," 831.

²⁸ Ibid.

²⁹ Steven C. Padgitt and Janet S. Padgitt, "Cognitive Structures of Sexual Harassment: Implications for University Policy," Journal of College Student Personnel 27, no. 1 (January 1986): 34.

The Impact of Student-to-Student Sexual Harassment on the
Campus Environment

The environment that exists at any higher education institution has a profound effect on the educational benefit a student receives during her tenure at the institution, and any negative adulteration of that environment diminishes the educational benefit that a student receives.³⁰ A campus environment that allows, and even possibly promotes, student-to-student sexual harassment can prevent harassed students from reaching their full academic potential.³¹ As Adams and Arbarbanel have written, it is difficult for students to learn in an environment where they do not feel safe.³²

When the campus environment becomes hostile and these sexually harassed students cannot enjoy campus facilities that they are entitled to use and enjoy, it is more than an "offense"; it is "harm" that can and should be legally proscribed.³³ In addition to the loss of enjoyment of campus facilities, a hostile environment created by student-to-student sexual harassment exacts an even greater price

³⁰ Ronna G. Schneider, "Sexual Harassment and Higher Education," Texas Law Review 65 (1987): 540.

³¹ Id. at 551.

³² Aileen Adams & Gail Abarbanel, Sexual Assault on Campus: What Colleges Can Do (Santa Monica: Rape Treatment Center, 1988): 6.

³³ See generally, Jean C. Love, "Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress," Washington and Lee Law Review 47 (1990).

when it lessens a woman's commitment to already male-dominated areas of study.³⁴ In general, because the campus environment helps to shape a student's concept of herself, a hostile environment can have a detrimental effect on a sexually harassed student's self-concept, as well as retard the skill development needed for future academic and professional challenges.³⁵

Rich describes the reality faced by female students on the college campus:

Women and men do not receive an equal education because outside the classroom women are perceived not as sovereign beings but as prey. . . . More subtle, more daily than rape is the verbal abuse experienced by the woman student on many campuses. . . . where, traversing a street lined with fraternity houses, she must run a gauntlet of male commentary and verbal assault. The undermining of self, of a woman's sense of her right to occupy space and walk freely in the world, is deeply relevant to education. The capacity to think independently, to take intellectual risks, to assert ourselves mentally, is inseparable from our physical way of being in the world, our feelings of personal integrity. If it is dangerous for me to walk home late one evening from the library. . . . how self-possessed, how exuberant can I feel as I sit working in that library?³⁶

This lifestyle begins to take its toll if it is experienced often enough. Whether the harassment is experienced by a female executive, a woman walking down the street, or a woman walking to her residence hall past

³⁴ Benson and Thomas, "Sexual Harassment on a University Campus," 236.

³⁵ Hall and Sandler, The Classroom Climate, 2.

³⁶ Adrienne Rich, On Lies, Secrets, and Silence (New York: W.W. Norton & Co., 1979) at 241-42.

fraternity houses, there is a gradual deterioration of self respect with every whistle, cat call, or familiar pat.³⁷ Persistent exposure to unwelcome sexual advances can cause anxiety, fear, and frustration.³⁸ Unfortunately, because this fear and frustration are most often turned inward, these initial feelings turn into shame or guilt.³⁹ The cost of sexual harassment, however, is not only mental. Vexed by these feelings of shame or guilt, victims of sexual harassment have been known to suffer "stomach-aches, headaches, nausea, involuntary muscular spasms, insomnia, hypertension, and other medical illnesses."⁴⁰

Environmental harassment inflicts a variety of physical, emotional and psychological harm upon a victim solely as a result of gender.⁴¹ Such harassing behavior discriminatorily humiliates and, in some cases, incapacitates its victims in the higher education context just as it does in the workplace.⁴² Therefore, a college campus environment that is hostile to women should be

³⁷ Andrea Medea and Kathleen Thompson, Against Rape (New York: Farrar, Straus and Giroux, 1974), 50.

³⁸ Tong, Women, Sex and the Law, 66.

³⁹ Ibid.

⁴⁰ Constance Backhouse and Leah Cohen, Sexual Harassment on the Job (Englewood Cliffs, N.J.: Prentice-Hall, 1982), 38-39.

⁴¹ Schneider, "Sexual Harassment," 551.

⁴² Id.

precluded by Title IX of the Education Amendments of 1972, just as it is in the workplace by Title VII of the Civil Rights Act of 1964.⁴³

Legislative History of Title IX

Title VII of the 1964 Civil Rights Act and Title IX of the Educational Amendments of 1972 are the two major federal statutes used to bring suit against educational institutions for alleged sexual discrimination.⁴⁴ Title VII prevents discrimination in the workplace and Title IX prevents discrimination in educational programs.⁴⁵ However, despite the fact that both statutes attempt to eradicate discrimination based on sex, each statute has different requirements to be met for compliance. The language of Title IX parallels Title VI of the Civil Rights Act of 1964, not Title VII,⁴⁶ so that the enforcement actions of Title IX could rely upon precedents set by Title VI.⁴⁷

Title VII does not require an employer to establish grievance procedures, unlike Title IX.⁴⁸ The existence of such a grievance procedure shows congressional intent to try

⁴³ Id. at 550. See also, Faber, "Expanding Title IX," 85-143.

⁴⁴ Id. at 526.

⁴⁵ Id.

⁴⁶ Id. at 544.

⁴⁷ Id. at 543.

⁴⁸ Id. at 545.

to prevent such harassing behavior as well as a way to process complaints more efficiently.⁴⁹ As Schneider wrote, perhaps the inclusion of these requirements ". . . suggest[s] that Congress perceived the need for broader protection against discriminatory behavior in the academic context than in the employment context."⁵⁰

In 1980 the Equal Employment Opportunity Commission, the office charged with the enforcement of Title VII, ruled that sexual harassment was considered an unlawful employment practice under Title VII of the Civil Rights Act of 1964.⁵¹ The EEOC went on define sexual harassment to include two types of sexual harassment--quid pro quo and hostile environment.⁵² However, while the EEOC established guidelines to assist employers in interpreting Title VII as it pertained to the workplace, the Office for Civil Rights (OCR) in the Department of Education failed to provide similar guidelines regarding sexual harassment, especially student-to-student sexual harassment, in educational institutions.⁵³ This omission has proven significant in light of the increasing reports of sexual harassment

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Gary N. Powell, "Effects of Sex Role Identity and Sex Definitions of Sexual Harassment," Sex Roles: A Journal of Research 14, nos.1/2 (January 1986): 9-10.

⁵² 29 C.F.R. Sec. 1604.11(a) (1980).

⁵³ Schneider, "Sexual Harassment," 527.

committed by one student against another on college campuses.⁵⁴

Despite this omission, however, the OCR and the courts continue to interpret Title IX as prohibiting sexual harassment.⁵⁵ In 1981, the OCR acknowledged the existence of student-to-student sexual harassment but did not take any steps to provide remedies for the harassment.⁵⁶ Notwithstanding, since higher education institutions are required to provide an environment free of discrimination,⁵⁷ it seems that ignoring student-to-student sexual harassment,

⁵⁴ Hughes and Sandler, Peer Harassment, 2.

⁵⁵ Bernice R. Sandler, The Restoration of Title IX: Implications For Higher Education (Washington, D.C.: Project on the Status and Education of Women, January 1989): 5.

⁵⁶ See, Kimberly A. Mango, "Students Against Professors: Combatting Sexual Harassment Under Title IX on the Education Amendments of 1972," Connecticut Law Review 23, no. 1 (Winter 1991): 381, citing Office for Civil Rights of the Department of Education, Policy Memorandum from Antonio J. Califia, Director for Litigation Enforcement and Policy Services, OCR, to Regional Civil Rights Directors, Title IX and Sexual Harassment Complaints (August 31, 1981) stated:

The other unresolved issue relates to a recipient's responsibility for the sexual harassment acts of students against fellow students in the context of the situation in which neither student is in a position of authority, derived from the institution, over the other student(s). . . . A theory upon which a more expansive institutional liability would be placed is premised upon a Title VII case [in which] [l]iability was premised on the theory that co-workers and supervisors had interfered with the employment relationship to the degree that the work environment was not free from sex discrimination.

⁵⁷ Sandler, Restoration of Title IX, 5.

which creates an offensive discriminatory environment and interferes with a student's ability to learn, would put an institution in violation of Title IX.⁵⁸

Perhaps the reluctance of the OCR to officially address the issue of student-to-student sexual harassment stems from the fact that very little legislative history exists concerning Title IX.⁵⁹ What debate does exist centers around sex discrimination in admission procedures and not about the discrimination a student might face once admitted to an institution.⁶⁰ Nowhere does the debate discuss student-to-student sexual harassment.⁶¹

However, although Title VII applies only to the work setting, an argument can be made for applying EEOC regulations prohibiting sexual harassment by peers in the workplace to the educational environment.⁶² This type of

⁵⁸ Ibid.

⁵⁹ Schneider, "Sexual Harassment," 543.

⁶⁰ Congressional Record, 92nd Cong., 1st sess., 1971. Vol. 117, pt. 23, 30403.

⁶¹ Faber, "Expanding Title IX," 112.

⁶² In *Moire v. Temple University School of Medicine*, 613 F.Supp. 1360 (E.D. Pa. 1985), aff'd, 800 F.2d 1136 (3d Cir. 1986), the District Court implied, for the first time, that the EEOC Guidelines on Sexual Harassment are also applicable to Title IX; *Mabry v. State Bd. of Community Colleges and Occupational Educ.*, 813 F.2d 311, 316 n. 6 (10th Cir. date), cert. denied, 463 U.S. 582, 108 S.Ct. 148, 98 L.Ed.2d 104 (1987), explicitly stated that, "[b]ecause Title VII prohibits the identical conduct prohibited by Title IX, i.e. sex discrimination," it would regard Title VII "as the most appropriate analogue when defining Title IX's substantive standards. . . ."

application can arguably be justified because the EEOC Guidelines prohibiting employer to employee sexual harassment have been used successfully in the work setting and also been used in the educational setting to evaluate sexual harassment in faculty-student relationships.⁶³ Additionally, the language in the EEOC Guidelines is currently being used in state statutes to prohibit sexual harassment in the educational setting."⁶⁴

Judicial Interpretation of Title IX

As yet, there have been no reported cases of student-to-student sexual harassment occurring in higher education institutions. The sexual harassment cases in educational institutions that have been reported most often involve

⁶³ *Moire v. Temple University School of Medicine*, 613 F. Supp. 1360, aff'd, 800 F.2d 1136.

⁶⁴ The Minnesota Human Rights Act, as cited in Joann Strauss, "Peer Sexual Harassment of High School Students," at 174, defines sexual harassment to include:

[u]nwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when: (1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment, public accommodations or public services, education, or housing; (2) submission to or rejection of that conduct or communication by an individual is used as a factor in decision [sic] affecting that individual's employment, public accommodations or public services, education, or housing; or (3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodation, public services, educational, or housing environment. . .MINN. STAT. sec. 363.01, subd. 41. (1990).

harassment of a student by a professor, teacher or coach.⁶⁵ However, when interpreting new statutes, courts often analogize principles from other case law decided under similar statutes.⁶⁶ Thus, the standards enunciated in case law by the courts under Title VII have often been used to interpret Title IX cases.⁶⁷

Cause of Action

A criminal prosecution or a civil suit, in the form of a tort action, are two means of legal redress available to victims of sexual harassment.⁶⁸ However, it is rare that sexual harassment is actually prosecuted in criminal court for a number of reasons. A prosecutor usually will not take the time to press criminal charges if a woman is not

⁶⁵ See, *Patricia H. v. Berkeley Unified School District*, 830 F.Supp. 1288 (1993); *Ruh v. Samerjan*, 816 F.Supp. 1326 (1993); *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028 (1992); *Lipsett v. Rive-Mora*, 669 F.Supp. 1188 (D.P.R. 1987), rev'd sub nom., *Lipsett v. U. Puerto Rico*, 864 F.2d 881 (1st Cir. (Puerto Rico) 1988), appeal after remand, *Lipsett v. U. Puerto Rico*, 759 F.Supp. 40 (D.P.R. 1991); *Bougher v. University of Pittsburgh*, 882 F.2d 74 (1989); *Moire v. Temple University School of Medicine*, 613 F.Supp. 1360 (E.D. Pa. 1985), aff'd, 800 F.2d 1136 (3d Cir. 1986); *Alexander v. Yale University*, 631 F.2d 178 (2d Cir. 1980).

⁶⁶ See, *Cannon v. University of Chicago*, 441 U.S. 677 at 694-703, 99 S.Ct. 1946 at 1956-61, 60 L.Ed.2d 560 (1979), applying by analogy earlier decisions under Title VI; *Guardians Assn., et. al. v. Civil Service Comm. of the City of New York* (1983), 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866.

⁶⁷ Thomas M. Griffin, "Sexual Harassment and Title IX," Education Law Reporter 18 (1984): 518.

⁶⁸ Tong, Women, Sex and the Law, 71.

seriously injured.⁶⁹ Subsequently, if the injury is severe, it would most likely be prosecuted as assault and battery or rape which carries a stiffer penalty than sexual harassment.⁷⁰

Additionally, the state is often reluctant to prosecute perpetrators of sexual harassment unless they are able to find corroborating testimony by other victims of harassment at the hands of the same perpetrator.⁷¹ As one author has noted, "male members of the criminal justice system are quite reluctant to invoke the harm principle against sexual harassers because they remain unconvinced, on some level, that sexual harassment can indeed constitute a serious harm to a woman's physical or psychological integrity."⁷²

The basic tort theories used by victims against private employers to assess blame and impose liability for sexual harassment include intentional infliction of emotional distress, assault and battery, negligent hiring and supervision, and constructive discharge which have their basis in civil law.⁷³ Some states also rely on workers'

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid., 72.

⁷² Ibid.

⁷³ Lisa A. Brown, "Title VII and Beyond: Developments in the Law of Sexual Harassment," OCT Houston Law 30 (September/October 1992): 8-9.

compensation laws in order to resolve disputes.⁷⁴ Another avenue for redress gaining popularity among public employees who are victims of sexual harassment has been a claim for a civil rights violation under the Equal Protection Clause of the Fourteenth Amendment pursuant to 42 U.S.C. sec. 1983.⁷⁵

Although courts today recognize the two types of harassment--quid pro quo and hostile environment--as actionable violations of Title VII and Title IX, this was not always the case. In Alexander v. Yale University,⁷⁶ five students brought an action against the university alleging that the sexual harassment of female students by faculty members violated Title IX. In particular, one plaintiff claimed that based on discussions she had had with a female student who had been sexually harassed, she suffered emotional distress, was fearful of associating with male faculty, and was deprived of the "tranquil atmosphere

⁷⁴ Id. at 9.

⁷⁵ Id. at 8. Section 1983 of the Civil Rights Act of 1871 states:

Every person who, under color of statute, ordinance, regulation, custom or usage of any State. . . subjects or causes to be subjected, any citizen of the United States. . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

⁷⁶ 459 F.Supp. 1 (D. Conn. 1977), aff'd 631 F.2d 178 (2nd Cir. 1980).

necessary to her pursuit of a liberal education."⁷⁷ The plaintiffs also argued that the university's failure to comply with its regulatorily imposed duty to implement such procedures for dealing with sexual harassment on campus amounted to a de facto policy condoning sexual harassment which denied an equal educational opportunity.⁷⁸ The appellate court rejected this argument and held that such vicarious environmental claims as "atmosphere" were "imponderables" not cognizable under Title IX.⁷⁹

It was not until Meritor Savings Bank, FSB v. Vinson,⁸⁰ that the Supreme Court recognized that sexual harassment that creates a hostile environment qualifies as sex discrimination under Title VII declaring: "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."⁸¹ With this landmark decision, the legal system afforded a new means of relief for victims of sexual harassment caused by a hostile environment through the use of the federal statute Title VII.

⁷⁷ Id. at 182.

⁷⁸ Id. at 181.

⁷⁹ Id. at 182.

⁸⁰ 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).

⁸¹ Id. at 65.

However, despite the fact that the courts have interpreted Title VII to prohibit a hostile environment as actionable sexual harassment because it is sex discrimination, there has, as yet, been no test case dealing with student-to-student sexual harassment in higher education that would provide the courts with an opportunity to expand such reasoning to hostile environment cases under Title IX.⁸²

In Bougher v. University of Pittsburgh,⁸³ a female student brought an action against the university to recover for an alleged violation of Title IX arising out of a professor's sexual harassment of a student. The district court refused to find that Title IX prohibited hostile environment sexual harassment and admonished Bougher for trying to extend Title VII theory to the educational environment absent a clear directive from Congress.⁸⁴

[T]o suggest, as plaintiff must, that unwelcome sexual advances, from whatever source, official or unofficial, constitute Title IX violations is a leap into the unknown which, whatever its wisdom, is the duty of Congress or an administrative agency to take. Title IX simply does not permit a "hostile environment" claim as described for the workplace.⁸⁵

⁸² Donald D. Gehring, "Abreast of the Law," NASPA Forum 14, no. 3 (November 1993): 6.

⁸³ 713 F.Supp. 139 (W.D.Pa. 1989), aff'd, 882 F.2d 74 (3d Cir. 1989).

⁸⁴ Id. at 145.

⁸⁵ Id.

On appeal, however, the Third Circuit rejected the district court's narrow reading of Title IX and declined to adopt [the lower court's] reasoning in toto.⁸⁶ The appellate court, however, failed to address the question of whether evidence of a hostile environment is sufficient to sustain a claim of sexual discrimination in education in violation of Title IX.⁸⁷

One recent case, decided on the actionability of a hostile environment claim under Title IX, is Patricia H. v. Berkeley United School District,⁸⁸ from the Northern District of California. The district court in Patricia H. held that "a hostile educational environment" could, in fact, provide a basis for a suit under Title IX.⁸⁹ In the instant case, the hostile environment was created by a teacher who allegedly molested a student and her sister while he was dating the students' mother.⁹⁰ Patricia H. is the most recent case that has explicitly prohibited the creation of a hostile environment as violative of Title IX.⁹¹

⁸⁶ Id at 77.

⁸⁷ Id.

⁸⁸ 830 F.Supp. 1288 (1993).

⁸⁹ Id.

⁹⁰ Id.

⁹¹ "Courts Affirm Title IX Coverage of Hostile Environment Sexual Harassment," About Women on Campus 3, no. 1 (Winter 1994): 2.

Burden of Proof

In Henson v. City of Dundee, the Eleventh Circuit first established a five-part test that plaintiffs must prove in order to recover for hostile environment sexual harassment claims.⁹² To prevail, a plaintiff must first show that she belongs to a protected class, which is not difficult since sex is already considered a protected class under Title VII.⁹³ Second, the plaintiff must demonstrate that she was subject to unwelcome sexual attention.⁹⁴ In doing so, the plaintiff must show that she did not solicit the attention and regarded the conduct as undesirable or offensive.⁹⁵ Third, the plaintiff must show that the alleged harassment was based on her sex.⁹⁶ In other words, she must show that but for the fact that she was a woman, she would not have been harassed.⁹⁷ Fourth, she must show that the harassment affected a term, condition, or privilege of her employment.⁹⁸ Finally, a plaintiff must show that the employer knew or should have known of the harassment and

⁹² 682 F.2d 897 (11th Cir. 1982) at 903-05.

⁹³ Id. at 903.

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ Id. at 903-04.

⁹⁸ Id. at 904.

failed to take remedial action."⁹⁹ With very little modification, this test remains intact today for use by the courts.¹⁰⁰

Psychological Harm

In Meritor, the Supreme Court expanded on earlier conclusions that the psychological damage of work environment harassment was intended to be covered by Title VII stating:

[T]he phrase "terms, conditions or privileges of employment" in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.¹⁰¹

Until recently, most courts required that in order to violate Title VII, the harassment must be "sufficiently severe and persistent to affect seriously the psychological well being of employees. . . ."¹⁰² Therefore, a plaintiff was

⁹⁹ Id. at 905.

¹⁰⁰ Ann C. Juliano, "Did She Ask For It? The 'Unwelcome' Requirement in Sexual Harassment Cases," Cornell Law Review 77 (1992): 1571.

¹⁰¹ Meritor, 477 U.S. at 66 (quoting Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971)).

¹⁰² Henson at 904.

only likely to succeed if her mental suffering was "debilitating to the average person."¹⁰³

In Rabidue v. Osceola Refining Co.,¹⁰⁴ the court refused to find plaintiff's workplace a hostile environment despite the fact that she was subjected to a co-worker who often referred to women as "whores," "cunts," "pussies," and "tits."¹⁰⁵ The court held that the plaintiff had "the burden of proving that the defendant's conduct would have. . . affected seriously the psychological well-being of a reasonable employee."¹⁰⁶ The court reasoned that the plaintiff's work environment could not be considered hostile when compared to society in general which ". . .condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and at other places."¹⁰⁷ Faber interestingly noted that, if such is the case, no sexual harassment claim would be actionable as long as some segment of society continued to sexually exploit women.¹⁰⁸

¹⁰³ Anne C. Levy, "Righting the 'Unrightable Wrong': A Renewed Call for Adequate Remedies Under Title VII," Saint Louis University Law Journal 34 (1990): 571.

¹⁰⁴ 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987).

¹⁰⁵ Id. at 623-24.

¹⁰⁶ Id. at 620.

¹⁰⁷ Id. at 622.

¹⁰⁸ Faber, "Expanding Title IX," 121.

The Ninth Circuit used a different test to determine whether "conduct is sufficiently severe or pervasive to alter the conditions of employment and create a hostile working environment" in Ellison v. Brady.¹⁰⁹ In Ellison, the court decided:

It is the harasser's conduct which must be pervasive or severe, not the alteration in the conditions on employment. Surely, employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation. . . . Although an isolated epithet by itself failed to support a cause of action for a hostile environment, Title VII's protection of employees from sex discrimination comes into play long before the point where the victims of sexual harassment require psychiatric assistance.¹¹⁰

Recently, in a unanimous decision during its 1993-1994 session, the Supreme Court settled the dispute concerning the requirement that a plaintiff show proof of severe psychological harm in order to collect damages in Harris v. Forklift Systems, Inc.¹¹¹ In Harris, Justice O'Connor wrote that courts should look at a number of factors to determine whether certain conduct has reached the level of sexual harassment: the frequency of the behavior, its severity, whether the behavior was threatening or humiliating, and whether the behavior unreasonably interfered with the person's work, adding that ". . . while psychological harm,

¹⁰⁹ 927 F.2d 872 (9th Cir. 1991).

¹¹⁰ Id. at 877-78.

¹¹¹ 114 S.Ct. 367 (1993).

like any other factor may be taken into account, no single factor is required."¹¹²

The Reasonable Woman Standard

Although the Supreme Court refused to uphold the "severe psychological harm" requirement found in Rabidue, the opinion is still noteworthy. Judge Keith's dissent in Rabidue discouraged the use of the reasonable person standard in favor of the reasonable victim in order to account for the discrepancies in appropriate sexual behavior between men and women.¹¹³ Judge Keith's innovative dissent stated that ". . . unless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men."¹¹⁴ Judge Keith disagreed with the majority which said that because the plaintiff was subjected to demeaning depictions of women in society in general, she could not claim a hostile environment in the workplace for the same depictions.¹¹⁵ Judge Keith instead stated that the relevant

¹¹² Id.

¹¹³ Cathleen M. Mogan, "Current Hostile Environment Sexual Harassment Law: Time to Stop Defendants From Having their Cake and Eating It Too," Notre Dame Journal of Law, Ethics, and Public Policy 6 (1992): 548.

¹¹⁴ Rabidue at 626.

¹¹⁵ Id. at 627.

issue was "what the reasonable woman would find offensive, not society, which at one point also condoned slavery."¹¹⁶

Since the publication of the Rabidue opinion, Judge Keith's proposed standard has gained momentum in the courts. His call for a test that gives increased consideration to the underlying sociological differences that exist between men and women received special attention in both Ellison v. Brady¹¹⁷ and Robinson v. Jacksonville Shipyards Inc.¹¹⁸

Following Judge Keith's lead in Rabidue, the Ellison court's reasonable woman test asked the question: Would a reasonable woman find the conduct in question offensive?¹¹⁹ In contrast to the majority in Rabidue, the majority in Ellison attempted to guide society toward a more equal treatment of women with their decision, not mirror the status quo which exhibited a discriminatory view of women.¹²⁰

The court based its decision to use the reasonable women standard in part on the fact that women are disproportionately victims of rape and sexual assault.¹²¹

¹¹⁶ Id.

¹¹⁷ 924 F.2d 872 (9th Cir. 1991).

¹¹⁸ 760 F.Supp. 1486 (M.D.Fla. 1991).

¹¹⁹ Ellison at 879. See also, Rabidue, 805 F.2d 627 (Keith, J., dissenting).

¹²⁰ Toni Lester, "The Reasonable Woman Test in Sexual Harassment Law-Will It Really Make A Difference?" Indiana Law Review 26 (1992): 229.

¹²¹ Ellison at 879.

Thus, it would be reasonable for a woman to be harmed by harassing conduct that a man might consider harmless.¹²² Similarly, the district court in Jacksonville Shipyards relied on an extensive record of expert testimony concerning how women are impacted negatively by sexual harassment when making their decision that, in fact, the plaintiff had been subjected to a hostile environment.¹²³

In a recent case decided by the New Jersey Supreme Court, the court held that the facts of each sexual harassment claim must be decided with the knowledge of the differences between male and female perspectives in mind.¹²⁴ The court added that the reasonable person standard tends to be male-biased because "our courts and our society in general view the male perspective as the objective or normative one."¹²⁵ However, despite scattered judicial acknowledgement of sociological testimony, which seems to provide a basis for the acceptance of a reasonable women standard, this acceptance of the reasonable woman is not at all unanimous.

Some districts believe that the recognition of the reasonable woman standard will compromise legal standards. For example, the Michigan Supreme Court rejected the

¹²² Id.

¹²³ Jacksonville Shipyard at 1502-07.

¹²⁴ Lehmann v. Toys 'R' Us, 626 A.2d 445 (N.J. 1993).

¹²⁵ Id.

reasonable woman standard in favor of a more objective test.¹²⁶ The court rejected the gender-conscious standard because it "eliminates community standards and replaces them with standards formulated by a subset of the community. . . [which] would inexorably lead to the fragmentation of legal standards to the detriment of society."¹²⁷ The belief that women are entitled to a separate legal standard reinforces the stereotypical notion that justified the subordination of women in the workplace in the first place.¹²⁸

At present, the United States Supreme Court has not reviewed the standards set down in any of these lower court decisions so each circuit is not required to use any particular standard--reasonable person, reasonable woman, or otherwise--when making their decisions.¹²⁹

Unwelcome Advances

Because the legal system proceeds from a male perspective, in determining whether sex discrimination via sexual harassment has occurred, the courts often operate under stereotypical beliefs about how harassed women should behave, or whether the harassing conduct was "unwelcome" when admitted as evidence at trial.¹³⁰ Such handling by the

¹²⁶ Radtke v. Everett, 501 N.W.2d 155 (1993).

¹²⁷ Id.

¹²⁸ Id.

¹²⁹ Lester, "Reasonable Woman Standard," 229.

¹³⁰ Juliano, "The 'Unwelcome' Requirement," 1558-59.

legal system only serves to weaken the significance of the hostile environment claim by subjecting it to male-biased interpretation in the courtroom.¹³¹ However, the EEOC has stated that the welcomeness requirement is needed to "ensure that sexual harassment charges do not become a tool by which one party to a consensual sexual relationship may punish the other."¹³² The concept that women "cry wolf" and abuse the legal system to punish others is a familiar concept in legal history.¹³³

Another problem with the unwelcomeness requirement is that it fails to account for the uneven power dynamics not only in the workplace or educational setting but in society in general.¹³⁴ In practice, it is very difficult to assess whether the alleged harassing conduct was truly welcome.¹³⁵ A victim of sexual harassment may acquiesce to such harassment because she fears retribution from an employer, professor, or other person having power over her; nonetheless, courts may falsely regard this victim's

¹³¹ Id. at 1559.

¹³² Brief for EEOC, Meritor (No. 84-1979).

¹³³ Juliano, "The 'Unwelcome' Requirement," 1575. See generally, Susan Moller Okin, Women in Western Political Thought (Princeton, N.J.: Princeton University Press, 1979).

¹³⁴ Juliano at 1575.

¹³⁵ Id.

compliance as consent.¹³⁶ If the unwelcomeness requirement is to remain part of the plaintiff's burden of proof in court, such inequities in the legal system must be reassessed to account for this male-bias.¹³⁷

Liability

Traditionally, courts have found employers more liable for the harassing acts of supervisors than for the comparable acts of co-workers.¹³⁸ In the case of supervisors, the EEOC holds employers liable for the sexually harassing acts of supervisors whether or not they knew of the harassment; however, they find an employer liable for the harassing acts of co-workers only if they knew or should have known of the harassment and failed to take appropriate steps to stop it.¹³⁹ Yet this knowledge requirement may be changing.

In Reynolds v. Borough of Avalon,¹⁴⁰ a federal district court recently held an employer liable for failing to take steps to prevent sexual harassment by co-workers, even though the employer may have been unaware, either actually or constructively, that such incidents were occurring. The

¹³⁶ Id.

¹³⁷ Id. at 1559.

¹³⁸ David E. Terpstra and Douglas D. Baker, "Outcomes of Sexual Harassment Charges," Academy of Management Journal 31, no. 1 (March 1988): 187.

¹³⁹ Ibid.

¹⁴⁰ 799 F.Supp. 442 (D.N.J. 1992).

court held that the failure to inform employees of a policy prohibiting sexual harassment or to institute procedures for reporting and investigating allegations, even in the absence of knowledge of violations, created an extremely high risk that sexual harassment might occur.¹⁴¹ The court also held that the risk of sexual harassment in the workplace was so obvious that failure to take action to prevent it constituted a "deliberate indifference" sufficient for finding a civil rights violation.¹⁴²

What was once a clear requirement on the part of employers in terms of actual and constructive knowledge is becoming more ambiguous in light of current trends in the standard of proof. This dilemma is exacerbated in the educational setting because there are no standard guidelines addressing a knowledge requirement for Title IX such as those imposed by the EEOC for Title VII. Therefore, each court must use its own judgement when assessing whether an educational administrator's knowledge, or lack of knowledge about a sexually harassing situation can shield that institution from liability.¹⁴³ Based upon the theory that universities have a duty to "protect their students from violence," and additionally, that students rely on that

¹⁴¹ Id.

¹⁴² Id.

¹⁴³ See Patricia H., 830 F.Supp 1288 (1993); Jane Doe v. Petaluma City School District, 830 F.Supp. 1560 (1993).

protection, courts should hold universities liable for failing to attempt to abolish discriminatory harassment.¹⁴⁴ Schneider goes even further saying that liability of an educational institution should result "if the institution directly create[d] a hostile environment by its failure to comply with its statutory and regulatory duty to establish an antidiscrimination policy and grievance procedure."¹⁴⁵

In Patricia H.,¹⁴⁶ the court contemplated the significance of the environment in an educational institution when it stated:

[t]he importance and function of environment is different in academic than in the workplace. . . . A nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program. . . . [A] higher standard should be imposed upon an employer with regard to his employee. . . . The student-faculty relationship encompasses a trust and dependency that does not inherently exist

¹⁴⁴ Nieswand v. Cornell University, 692 F.Supp. 1464 (1988) (court refused to dismiss suit brought by parents against university for the wrongful death of their daughter who was shot in her dormitory by the boyfriend of her roommate); Peterson v. San Francisco Community College District, 36 Cal.3d 799, 205 Ca.Rptr. 842, 685 P.2d 1193 (1983) (university was liable for the sexual assault of a student in a parking garage based upon landlord/tenant theory); Mullins v. Pine Manor College, 398 Mass. 47, 449 N.E.2d 331 (1983) (university was liable for the sexual assault of a student on the campus based upon the special relationship between institution and student).

¹⁴⁵ Schneider, "Sexual Harassment," 572. This argument was plead unsuccessfully in Alexander v. Yale, 631 F.2d 178.

¹⁴⁶ 830 F.Supp. 1288 (1993) at 1293.

between parties involved in a sexual harassment claim under Title VII.¹⁴⁷

However, it should be remembered that this case involved a hostile environment created by the sexually harassing actions of a teacher.¹⁴⁸ In another case in the same district involving the sexual harassment of a student by fellow classmates,¹⁴⁹ the court held that in order to obtain damages under Title IX it is not enough that the institution knew or should have known of the hostile environment and failed to take appropriate action.¹⁵⁰ The district court required the plaintiff to prove "intentional discrimination" on the part of an institution which must know of the harassing situation and fail to take appropriate steps to stop it.¹⁵¹ It should be noted that having to show "intentional discrimination" on the part of an institution places a higher burden of proof on victims seeking compensation in the educational setting under Title IX than on victims seeking redress in the workplace under Title VII.¹⁵²

¹⁴⁷ Gehring, "Abreast of the Law," 7.

¹⁴⁸ Ibid.

¹⁴⁹ Jane Doe, 830 F.Supp. 1560.

¹⁵⁰ "Courts Affirm Title IX," 2.

¹⁵¹ Ibid.

¹⁵² Ibid., 2-3.

Remedy

Even though a case has not yet been brought addressing the issue of student-to-student sexual harassment in higher education, given the willingness of courts to provide relief for "hostile environment" sexual harassment created by co-workers under Title VII, such a claim may ultimately be successful against co-students under Title IX as it evolves in common law.¹⁵³ The amorphous nature of Title IX can be explained by Franklin v. Gwinnett County Public Schools¹⁵⁴ which is more likely to be remembered as a "remedies" case than a sexual harassment case. In Franklin, the Supreme Court ruled that under Title IX it is permissible for a plaintiff to ask for punitive damages as a remedy for a sexual harassment claim.¹⁵⁵ Until the Supreme Court's ruling in Franklin, courts were unwilling to assess punitive damages in cases of sexual harassment because such a remedy was not explicitly stated in the federal statute.¹⁵⁶ Franklin is a good example of how Title IX has evolved through judicial interpretation to meet the changing needs

¹⁵³ Martha M. McCarthy, "The Developing Law Pertaining to Sexual Harassment," Education Law Reporter 37 (1987): 12-13.

¹⁵⁴ 112 S.Ct. 1028 (1992).

¹⁵⁵ Id.

¹⁵⁶ Id.

of sexual harassment victims.¹⁵⁷ What makes the availability of punitive damages under Franklin most worrisome perhaps is that the educational institutions may not be covered by insurance because sexual harassment is an intentional act.¹⁵⁸

Despite the lack of guidelines that explicitly address student-to-student sexual harassment, or judicial remedies which would reflect the harm suffered by female students as a result of sexual harassment, an expansion of Title IX to include student-to-student sexual harassment should be considered in the near future. As MacKinnon said when reflecting on the inroads she had made regarding sex discrimination in the workplace, "Perhaps the most important lesson is that the mountain can be moved. When we started, there was absolutely no judicial precedent for allowing a sex discrimination suit for sexual harassment. Sometimes even the law does something for the first time."¹⁵⁹

¹⁵⁷ Id. At the time this case was brought by plaintiff, she had graduated from high school and the harassing coach had left that particular school. Therefore, the traditionally available remedies of injunctive or compensatory relief would do little to help plaintiff.

¹⁵⁸ Charles J. Russo, Virginia Davis Nordin, and Terrence Leas, "Sexual Harassment and Student Rights: The Supreme Court Expands Title IX Remedies," Education Law Reporter 75 (August 1992): 739.

¹⁵⁹ Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and the Law (Cambridge: Harvard University Press, 1987): 116.

MacKinnon's Theories of Dominance, Inequality
and Sex Discrimination

Hoff-Wilson wrote that the unequal treatment of women by society in general, including the legal system, is sanctioned by the U.S. Constitution and the Bill of Rights which created "an exclusively masculine system of justice based on English common law and the eighteenth-century ideals of liberty and equality that did not apply to the vast majority of Americans--the women--when the documents were drafted and adopted."¹⁶⁰ It is commonly held among feminist scholars, therefore, that because the legal constructs of the United States judicial system created by the founding fathers have their basis in "masculine jurisprudence," these legal constructs reinforce patriarchal values.¹⁶¹

Catharine MacKinnon, the legal scholar who pioneered the concept of sexual harassment as a form of sexual discrimination,¹⁶² has referred to this existing paradigm as

¹⁶⁰ Joan Hoff-Wilson, "The Unfinished Revolution: Changing Legal Status of U.S. Women," Signs: Journal of Women in Culture and Society 13, no.1 (1987): 7-8. See also, Okin, Women in Western Political Thought; Susan Moller Okin, Justice, Gender, and the Family (New York: Basic Books, 1989); Deborah L. Rhode, Justice and Gender: Sex Discrimination and the Law (Cambridge: Harvard University Press, 1989).

¹⁶¹ Patricia A. Cain, "Feminist Legal Scholarship," Iowa Law Review 77, no. 1 (October 1991): 23-24.

¹⁶² Fred Strebeigh, "Defining the Law on the Feminist Frontier," New York Times Magazine (6 October 1991, section 6): pp.29-31, 52-56.

the dominance theory of legal analysis.¹⁶³ As Garrett-Gooding and Senter have noted, our American culture has consistently condoned traditional sex-role attitudes where men are dominant over women in most aspects of their lives, including men's relationships with women.¹⁶⁴ Such an unequal distribution of power provides an easy opportunity for various forms of exploitation of the submissive sex--the women.¹⁶⁵ Rhode adds that the dominance theory is premised on the relation between the sexes being organized so that men dominate and women submit; and that this dominant/submissive relationship is the most fundamental social hierarchy across the culture and all male-female interactions reflect this structure.¹⁶⁶

MacKinnon provides a multitude of examples to show that the characteristics which distinguish men from women are those used to set the standard in society's organization and values.¹⁶⁷ For example:

¹⁶³ Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and the Law (Cambridge: Harvard University Press, 1987): 40.

¹⁶⁴ Joy Garrett-Gooding and Richard Senter, Jr., "Attitudes and Acts of Sexual Aggression on a University Campus," Sociological Inquiry 57, no. 4 (Fall 1987): 348.

¹⁶⁵ Ibid.

¹⁶⁶ Deborah L. Rhode, Justice and Gender: Sex Discrimination and the Law (Cambridge: Harvard University Press, 1989): 83.

¹⁶⁷ Catharine A. MacKinnon, "Legal Perspectives on Sexual Difference," 219, in Theoretical Perspectives on

Men's physiology defines most sports, their health needs largely define insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their military service defines citizenship, their presence defines family, their instability to get along with each other--their wars and rulership--define history, their images define god, and their genitals define sex.¹⁶⁸

To counter the male-biased perception in the legal system, MacKinnon offers her inequality theory which provides the basis for the legal argument that the unequal treatment of men and women in the justice system stems from the social subordination of women to men and this different treatment based on sex is a violation of civil rights and should be prohibited.¹⁶⁹ Revealing the inherent male-bias in the legal system is the first step in eradicating the bias of a legal system which places men in the favored and dominant position in society, under sanction of law. The second step, according to MacKinnon, is recognition by the justice system of the experiences of women which values the harm they have suffered at the hands of a male-biased legal system which can hopefully be accomplished through the legal arguments of the inequality theory.¹⁷⁰

Sexual Difference, Deborah L. Rhode ed. (New Haven: Yale University Press, 1990).

¹⁶⁸ Ibid.

¹⁶⁹ MacKinnon, Feminism Unmodified, 43.

¹⁷⁰ Ibid., 110.

Sex discrimination is rooted in this unequal power of male supremacy and female submissiveness¹⁷¹ and sexual harassment is the manifestation of this power imbalance which has been sanctioned by a male-biased legal system according to MacKinnon.¹⁷² MacKinnon's definition of sexual harassment is most broadly defined as the unwanted imposition of sexual requirements in a relationship of unequal power.¹⁷³

Sexual harassment of employees by employers is legally recognized by the justice system as is the sexual harassment of students by faculty and staff in educational institutions.¹⁷⁴ However, sexual harassment also occurs among co-workers, fellow students, and even by subordinates in the workplace, men who are women's hierarchical inferiors.¹⁷⁵ In other words, men sexually harass women regardless of their position in the formal hierarchy.¹⁷⁶ What makes peer harassment difficult to accept as a form of sex discrimination is the lack of positional power the harasser has over the victim. Yet, viewed through

¹⁷¹ Ibid., 40.

¹⁷² MacKinnon, Sexual Harassment, 7.

¹⁷³ Ibid., 1.

¹⁷⁴ Ibid., 107.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid. See also, Michele A. Paludi. Ivory Power: Sexual Harassment on Campus (Albany: State University of New York Press, 1990): 38.

MacKinnon's dominance framework, men are arguably more dominant in society by the very fact that they are men and this gives them power over women, even if men's formal positions, in the workplace or educational setting, are inferior.

Hoffman has written that the sexual harassment of women by men allows men to maintain social control over women by reinforcing the definitions of male and female sexuality as well as maintaining gender stratification and the hierarchical lines which currently exist in the workplace.¹⁷⁷ As Hoffman states: "The elimination of coercive forms of sexuality in the workplace or educational setting would eliminate one of the mechanisms by which gender stratification is sustained."¹⁷⁸

Impact of MacKinnon's Theories on Women at Law

MacKinnon notes that "the legal claim for sexual harassment marks the first time in history that women have defined women's injuries in a law."¹⁷⁹ Until then it was just something that happened to you and there was nothing you could do about it legally.¹⁸⁰ Research has shown that sexual harassment is an abuse of power, not simply offensive

¹⁷⁷ Frances L. Hoffman, "Sexual Harassment in Academia: Feminist Theory and Institutional Practice," Harvard Educational Review 56, no.2 (1986): 110.

¹⁷⁸ Ibid., 111.

¹⁷⁹ MacKinnon, Feminism Unmodified, 105.

¹⁸⁰ Ibid., 106.

behavior.¹⁸¹ Research has also shown that women often submit to unwanted sexual advances because they are in a position of inferiority compared to men in society.¹⁸² Tong wrote that in addition to being physically stronger than most women, men also control the balance of power "in the political, economic, and social institutions that govern us all."¹⁸³

MacKinnon states that the dominance theory has manifested itself at law in the unequal treatment of women.¹⁸⁴ MacKinnon uses the example of rape which, according to Rhode, has traditionally been defined by male views of male sexuality.¹⁸⁵ Firstly, prohibitions on force against women have functioned to protect men at least as much as women in order to preserve the patrilineal line for inheritance purposes.¹⁸⁶

Secondly, while the injury of rape lies in the perpetration of the act on the victim, the perpetrator's guilt lies in his perception of consent by the victim.¹⁸⁷

¹⁸¹ Tong, Women, Sex and the Law, 77.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ MacKinnon, Feminism Unmodified, 105.

¹⁸⁵ Rhode, Justice and Gender, 244-53.

¹⁸⁶ Ibid.

¹⁸⁷ Catharine A. MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," Signs:

Because consent is a defense to the crime of rape, if the assailant can convince a jury of his peers that he believed the victim consented, he is relieved of any guilt. In other words, the man's perception of the woman's wishes determine his culpability.¹⁸⁸ And so, when a woman has failed to prove a lack of consent, she is considered to have not been injured at all.¹⁸⁹ MacKinnon plainly states the inconsistency in the law by the following comment on the failure to prove consent: "She had sex. Sex itself cannot be an injury. Women consent to sex everyday. Sex makes a woman a woman. Sex is what women are for."¹⁹⁰ Even if there is no question of consent, juries are more likely to convict in a rape case where there is evidence of force or resistance.¹⁹¹

Because society teaches women that sexual harassment is a "normal" part of life that is a private issue between men and women, many harassed women fail to see sexual harassment for what it is--sex discrimination.¹⁹² MacKinnon wrote:

Women are taught to telegraph receptivity and to respond supportively to male sexual overtures, no

Journal of Women in Culture and Society 8, no. 4 (1983): 652.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid., 653.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Faber, "Expanding Title IX," 102.

matter how they may feel about the man. It is this that makes a woman "sexy" in the stereotypical sense. It is this that is often, in effect, a job qualification, just as a deferential, flattering manner to whites was once required of blacks of both sexes. These observations suggest that women tend to be economically valued according to men's perceptions of their potential to be sexually harassed.¹⁹²

Impact of MacKinnon's Theories on Women in Education

Student-to-student sexual harassment is a widespread problem that can prove a formidable obstacle to a student's educational goals.¹⁹⁴ Sexual harassment between students poses an even greater threat to victims because many campus administrators and courts sanction the harassing behavior with the rationalization that these young men are just discovering their sexuality and cannot be expected to control their strong urges.¹⁹⁵ Such a rationalization provides evidence, once again, of the existence of a male dominated ideology which operates in society.¹⁹⁶ As Sanday writes: "Both the [fraternity] brothers and many members of the broader university community excuse the behavior by saying that 'boys will be boys' and that if a women gets

¹⁹² MacKinnon, Sexual Harassment, 22-23.

¹⁹⁴ Phyllis L. Crocker, "An Analysis of University Definitions of Sexual Harassment," Signs: Journal of Women in Culture and Society 8, no. 4 (1983): 697.

¹⁹⁵ See, Peggy Reeves Sanday, Fraternity Gang Rape: Sex, Brotherhood, and Privilege on Campus (New York: New York University Press, 1990). See also, Michele A. Paludi, "Myths and Realities: Sexual Harassment on Campus," in Ivory Power: Sexual Harassment on Campus (Albany: State University of New York, 1990).

¹⁹⁶ Sanday, Fraternity Gang Rape, 11-12.

into trouble it is because 'she asked for it,' 'she wanted it,' or 'she deserved it.'¹⁹⁷

Like female employees in the workplace, female students in the university setting can identify a threat of physical sexual violence in sexual harassment.¹⁹⁸ Arguably, the perceived threat of sexual violence from a harassing male student may be more acute than the perceived threat in an employment situation.¹⁹⁹ University students are more likely to encounter each other in almost every facet of their lives, including their living situations, recreation, social gatherings and classes.²⁰⁰

However, as Tong wrote, student-to-student sexual harassment should not be labeled as sex discrimination unless the educational institution knew of the harassment and allowed it to exist without taking steps to eradicate it.²⁰¹ The knowledge requirement for assessing institutional liability should be actual or constructive, as it is in the workplace. Any failure on the part of an institution to terminate sexual harassment between students contaminates the educational atmosphere of the institution, just as it

¹⁹⁷ Ibid.

¹⁹⁸ Mari J. Matsuda, "Public Response to Racist Speech: Consider the Victim's Story," Michigan Law Review 87, (1989): 2370-72 nn. 249-57.

¹⁹⁹ Id.

²⁰⁰ Id.

²⁰¹ Tong, Women, Sex and the Law, 82-83.

does in the workplace between co-workers, and should be stopped if its presence is known by campus administrators.²⁰² As Faber states, failure to provide such protection to victims of student-to-student sexual harassment will succeed in thwarting the purpose of Title IX.²⁰³

²⁰² Ibid.

²⁰³ Ibid.

CHAPTER III METHODOLOGY

A traditional methodology of legal research was employed in the organization of this study. "Systematic inquiry into the law can be described as a form of historical-legal research."¹ The inquiry can be labeled as such because, to be reliable and useful, legal research must look at previous case law or legislation as well as legal commentary in order to understand how a law has evolved through the time; and to predict how that law may evolve in the future.²

The purpose of legal research is to locate and analyze "authoritative statements of the law which would be considered binding or highly persuasive to the court or other body which must make the ultimate decision on the particular matter in issue."³

When investigating a legal question, the researcher must examine primary sources of law which include federal, state and local statutes in one category, and case law,

¹ Charles J. Russo, "Legal Research: The 'Traditional' Method," NOLPE Notes 28, no. 10 (October 1993): 2.

² Ibid.

³ James H. McMillan and Sally Schumacher, Research in Education: A Conceptual Introduction, 2d ed. (Glenview, Ill.: Scott, Foresman & Co., 1989): 454. (quoting L.J. Peterson, R.A. Rossmiller, & M.M. Volz (2nd ed., 1978), The Law and Public School Operation, 496.

found in court decisions, in the other.⁴ Federal and state statutes can be located in both official and unofficial annotated compilations of codes.⁵ Examples of such primary sources of law are the U.S. Constitution, statutes, and administrative law.⁶ Applicable federal and state codes can be found using a descriptive word method, topic method, or popular name method.⁷

In addition to retrieving and analyzing pertinent legislation, case law which addresses the particular legal issue should be located. An analysis of applicable case law is important when trying to expand the purview of a statute such as Title IX because, while statutes govern all legal controversies, it is the judicial interpretation of those statutes which gives meaning to the written law.⁸ Court decisions containing the judicial interpretation of statutes or governing the disputed issues can be found in Reporters, bound volumes and looseleaf services which contain the courts' opinions.⁹ Shepard's Citations are used to update the legal status of a case to determine if it has been

⁴ McMillan and Schumacher, Research in Education, 455.

⁵ Ibid.

⁶ Russo, "The 'Traditional' Method," 3.

⁷ McMillan and Schumacher, Research in Education, 455-56.

⁸ Ibid., 453.

⁹ Ibid., 456.

affirmed, reversed, or otherwise modified in subsequent court cases.¹⁰

The researcher must also supplement the legal analysis of primary sources with secondary sources of law. Although these writings are not considered authoritative, courts can rely on such sources in reaching their own opinions about the cases they are deciding.¹¹ Examples of secondary sources are restatements of the law, legal encyclopedias, books, and law journals.¹² "After synthesizing primary and secondary sources, the analyst should be able to state a definitive position on the given legal issue."¹³ Research tools such as case digests which index case law and corresponding legal commentary both nationally and regionally can also be useful instruments in researching a legal issue.

In addition to a manual inquest, computer databases designed to retrieve legal information can be used to assist in a legal search. The best known legal databases are WESTLAW and LEXIS.¹⁴

¹⁰ Ibid., 459.

¹¹ Russo, "The 'Traditional' Method," 3.

¹² Ibid.

¹³ McMillan and Schumacher, Research in Education, 460.

¹⁴ Ibid.

While the terms primary and secondary are useful in describing the origins of the legal material analyzed in the research, they are not necessarily the order in which the researcher locates the material. Since there has been no case to date which addresses the issue of student-to-student sexual harassment in higher education, the researcher began by using secondary sources to locate specific legislation and case law which addressed the issue of sexual harassment, in general, and on the college campus.

Applicable legislation was read in order to determine what type of conduct was being regulated along with congressional debate which provided the necessary background for ascertaining the sentiments behind the passage of the legislation. Case law was then analyzed to learn the judicial reasoning behind each of the court's decisions. The analysis of case law as well as the furnishing of applicable legislation revealed the evolution the concept of sexual harassment on the college campus.

Data Sources

Both primary and secondary sources were used to locate applicable legislation and case law concerning student-to-student sexual harassment on the college campus. The primary sources of law used were federal legislation and federal case law which addressed the issue of sexual harassment of students on the college campus.

A search for appropriate legislation was made in both the United States Code Annotated (U.S.C.A.) and the United States Code Service (U.S.C.S.) which also cited applicable congressional debate. Legislation was located through use of the descriptive method and the topic method. A search for federal case law was made in the United States Reports for those cases reaching the Supreme Court level. The National Reporter System was searched for federal cases in the District Court and Circuit Court levels. The cases were shepardized using Shepard's Citations to assure the currency of the case law cited.

Secondary sources were located using the Index to Legal Periodicals which referenced law review articles as well as scholarly articles from other legal publications. The legal encyclopedias such as American Jurisprudence and Corpus Juris Secundum were used to locate other legal commentary. WESTLAW and LEXIS, the legal databases located on computer, were used to ensure that all research was as thorough and current as possible. ERIC and Dissertation Abstracts were used to locate germane references to nonlegal publications.

Data Organization

All collected data were organized chronologically within various subject headings in order to show the evolution of the legislative and judicial reasoning concerning the hostile environment precipitated by student-to-student sexual harassment.

Data Analysis

A computer search was conducted in order to locate secondary sources of law such as law review journals which contained articles that addressed the issue of sexual harassment and, in particular, student-to-student sexual harassment. The articles were examined to identify relevant federal legislation and case law. The researcher reviewed congressional debate wherein the applicable federal legislation was discussed in order to discover the legislative history of Title IX of the Civil Rights Act of 1972. The judicial reasoning of each federal court decision was analyzed in order to ascertain what factors influenced the courts' legal reasoning. Finally, the case law was interpreted once again to determine whether judicial reasoning was influenced by the subtle power differences which exist between men and women in society as stated in MacKinnon's theories of dominance, inequality and sex discrimination.¹⁵

Synthesis

After an analysis of legislation and case law, the researcher synthesized this information with the legal scholarship discussing MacKinnon's theories of dominance, inequality and sex discrimination. This was done in order to determine whether Title IX could be expanded to provide

¹⁵ See generally, Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (New Haven: Yale University Press, 1979).

an appropriate judicial remedy for victims of student-to-student sexual harassment on the college campus.

MacKinnon used the dominance theory to explain the evolution of the patriarchal legal system which initially refused to recognize harm to women except in terms of how that harm affected the men to whom they belonged.¹⁶ After the passage of Title VII and Title IX, controversies were brought to court by women who claimed they were harmed by sexual harassment, in particular, sexual harassment caused by a hostile environment.

The judicial reasoning of these cases was again analyzed but this time in light of both the dominance and inequality theories to aid in understanding the outcomes of the court cases. The dominance theory identified by MacKinnon pointed out the existence of a patriarchal legal system which has been slow to recognize harm to women caused by sexual harassment in a hostile environment.¹⁷ The inequality theory was offered by MacKinnon to argue against a patriarchal legal system which sanctioned the subordinate treatment of women because of their sex.¹⁸

By determining whether judicial reasoning relied on, or failed to rely on MacKinnon's theories acknowledging unequal

¹⁶ See generally, Susan Moller Okin, Women in Western Political Thought (Princeton, N.J.: Princeton University Press, 1979).

¹⁷ MacKinnon, Sexual Harassment, 5.

¹⁸ Ibid., 4-5.

power between men and women, it may be possible to predict whether future courts will be willing to expand the coverage of Title IX to include student-to-student sexual harassment. Keeping in mind the past injustices to women caused by our patriarchal legal system according to MacKinnon, an expansion of Title IX to include student-to-student sexual harassment might help to remedy the harm caused by such harassment.

Standards of Adequacy for Legal Research

The criteria for judging legal research differ somewhat from other forms of analytical research.¹⁹ Criticism of sources is one major concern of accurate legal research.²⁰ To ensure accuracy of the sources used, the researcher, an attorney, authenticated each source through the use of the established legal standard for citations.²¹ The basic purpose of legal citation is to allow the reader to locate a cited source as efficiently as possible.²²

To address the issue of internal criticism of the analysis, the researcher relied on the facts located in the record of each court case. In addition, the researcher

¹⁹ McMillan and Schumacher, Research in Education, 465.

²⁰ *Ibid.*, 446-450.

²¹ Harvard Law Review Association, The Bluebook: A Uniform System of Citation, 15th ed. (Cambridge: Gannett House, 1991).

²² *Id.* at 4.

relied on the record of the congressional debate which dealt with the passage of the applicable legislation. Secondary sources including legal commentary were read in order to ensure the accuracy and dependability of the researcher's analysis of the legislation and case law.

Supplementary criteria for judging legal adequacy included a clearly stated issue with the scope and limitations explained, commentary organized logically for analysis, a location and use of sources appropriate to answer the legal question posed, treatment of the topic in an unbiased manner, and conclusions which relate logically to the analysis.²³

²³ McMillan and Schumacher, Research in Education, 465.

CHAPTER IV ANALYSIS OF THE CASES

The purpose of this study was to examine existing sexual harassment statutes to determine if any of them provide a remedy to victims of student-to-student sexual harassment in higher education institutions. If current legal statutes were not found to extend such a remedy, a second purpose of the study was to explore the expansion of present legal theories affording protection against sex discrimination of students to include student-to-student sexual harassment, using Catharine MacKinnon's theories of dominance, inequality and sex discrimination as a base. This chapter analysis addresses the first of the two research questions that were posed: Sexually harassing conduct by co-workers is prohibited by Title VII of the Civil Rights Act of 1964 because it is sex discrimination. Through the analysis of appropriate federal legislation and federal case law, what argument can be made that student-to-student sexual harassment is sex discrimination which should be prohibited by Title IX of the Education Amendments of 1972?

Alexander v. Yale University

Alexander v. Yale University¹ was the first case to address the issue of sexual harassment in higher education. In Alexander, the Second Circuit Court of Appeals affirmed a district court decision which held that Yale University had not violated Title IX of the Education Amendments by failing to address sexual harassment complaints made by female students against male professors.² In particular, the plaintiffs claimed that Yale's "failure to combat sexual harassment of female students and its refusal to institute mechanisms and procedures to address complaints and make investigations of such harassment interfere[d] with the educational process and denie[d] equal opportunity in education" in violation of Title IX and H.E.W.'s regulation.³

Plaintiffs sought relief on behalf of themselves and as representatives of a class of Yale students and faculty "who are disadvantaged and obstructed in their educational relations" by Yale's failure to take any preventive steps

¹ 459 F.Supp. 1 (D.Conn. 1977), aff'd, 631 F.2d. 178 (2d. Cir. 1980).

² Id. at 180.

³ Id. at 181. Under authority of sec. 1682, H.E.W. requires educational institutions receiving federal assistance to "adopt grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part." 45 C.F.R. sec. 86.8(b).

toward ending the sexual harassment.⁴ The district court dismissed the claims of four of the plaintiffs and failed to certify the fifth plaintiff as a class.⁵ The court also failed to require Yale to establish a procedure for investigating sexual harassment complaints.⁶

The plaintiffs had claimed various injuries for which they sought redress. One plaintiff claimed that the sexual overtures made by her music professor constructively forced her to give up playing the flute and squelched any chance she had for a professional career in music.⁷ Another plaintiff claimed that although she was not the victim of sexual harassment, listening to stories of students who had been victims caused her "emotional distress" and deprived her of the "tranquil atmosphere necessary to [the] pursuit of a liberal education."⁸ The judges of the Second Circuit upheld the decision of the district court in dismissing four of the complaints claiming they had not "asserted claims of personal exclusion from a federally funded education program

⁴ Id.

⁵ Id. at 180.

⁶ Id.

⁷ Id. at 181.

⁸ Id. The court did not dismiss the allegation by Price which claimed that she was offered an "A" in return for the performance of sexual favors and when she refused she received a "C" in the class. The court stated that "academic advancement conditioned upon submission to sexual demands constituted sex discrimination in education." Id. at 182.

or activity, or of the personal denial of full participation in the benefits of such a program or activity in any measurable sense."⁹ The appellate court went on to state that "[n]o judicial enforcement of Title IX could properly extend to such imponderables as atmosphere or vicariously experienced wrong."¹⁰

In Alexander, the Second Circuit followed the district court in interpreting Title IX to mean that a federal suit could be sustained only if the plaintiff established that he or she had suffered a "distinct and palpable injury," and that "the exercise of the court's remedial powers would redress the claimed injury"¹¹ because "it is the deprivation of 'educational' benefits which, once proven, allows the courts to afford relief."¹²

Moire v. Temple University School of Medicine

Another case which addressed the ability of Title IX to remedy a student's claim of sexual harassment was Moire v. Temple University School of Medicine.¹³ In Moire, the plaintiff, a medical student, alleged violations of 42 U.S.C. secs. 1983 and 1985 and 20 U.S.C. sec. 1681 (Title

⁹ Id.

¹⁰ Id.

¹¹ Id. at 183.

¹² Id. at 184.

¹³ 613 F.Supp. 1360 (E.D.Pa. 1985), aff'd, 800 F.2d 1136 (3d Cir. 1986).

IX).¹⁴ The plaintiff claimed that as a result of discrimination based on her sex, she failed a psychiatric clerkship during medical school which, along with other failing grades caused her to have to repeat her third year of medical school.¹⁵ Plaintiff also asserted that medical school administrators violated her Fourteenth Amendment right to due process by failing to investigate or remedy her complaints of sexual harassment by attending physicians in a timely and appropriate fashion.¹⁶

In reaching a decision, the District Court for the Eastern District of Pennsylvania relied on the definition of sexual harassment stated in Sexual Harassment of Working Women: A Case of Sex Discrimination by Catharine MacKinnon as being "the unwanted imposition of sexual requirements in the context of a relationship of unequal power" such as the power differential manifested between employer and employee or professor and student.¹⁷

The district court in Moire followed the standard set down by the Second Circuit in Alexander that "tying academic advancement to sexual submission constitutes sex discrimination in education" a form of quid pro quo

¹⁴ Id. at 1362.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id. at 1366.

harassment.¹⁸ However, the Moire court also recognized an additional form of sexual harassment in the higher education setting--hostile environment sexual harassment.¹⁹ The hostile environment had been identified by the Equal Opportunity Employment Commission (EEOC) in their 1980 Guidelines on Sexual Harassment.²⁰ The Guidelines state that hostile environment sexual harassment occurs when the harassing behavior is so offensive that it violates a victim's civil rights.²¹

While the Moire court accepted the existence of the hostile environment in general, it found no credible evidence that plaintiff was subjected to a hostile environment during her third year of medical school.²² This decision was upheld without opinion by the appellate court.²³ In spite of the plaintiff's failure to succeed with her hostile environment claim, the Moire court did succeed in mutating the legal interpretation of Title IX

¹⁸ Id.

¹⁹ Id.

²⁰ Id. at 1366-67.

²¹ Id. at 1366. Since plaintiff never asserted that her attending physician attempted physical contact or threatened her with failure in order to receive sexual favors, the issue in this case was whether plaintiff was subjected to a hostile environment. Id. at 1367.

²² Id. at 1377.

²³ Moire v. Temple Univ. Sch. of Medicine, 800 F.2d 1136 (1986).

enough to form a parallel between Title VII and Title IX. The district court explicitly stated in a footnote to the case that even though sexual harassment "doctrine" has been developed in the context of Title VII, the guidelines are equally applicable to Title IX.²⁴

Meritor Savings Bank, FSB v. Vinson

It was not until 1986, however, with the case of Meritor Savings Bank, FSB v. Vinson,²⁵ that the United States Supreme Court held for the first time that sexual harassment which creates a hostile environment is sex discrimination actionable under Title VII.²⁶ In this case the employee, Mechelle Vinson, claimed that her employer asked her to engage in sexual relations and, out of fear of losing her job, she complied.²⁷ During the next several years she estimated that she had intercourse with her employer between 40 or 50 times, that he fondled her in front of other employees, exposed himself to her, and even forcibly raped her on several occasions.²⁸

In reaching their decision, Justice Rehnquist opined that the Supreme Court relied on the EEOC Guidelines on

²⁴ Id. at 1367.

²⁵ 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d (1986) (per curiam), aff'd, Vinson v. Taylor, 753 F.2d 141 (1987).

²⁶ Id. at 2405.

²⁷ Id. at 2402.

²⁸ Id.

Discrimination Because of Sex²⁹ which delineated two types of sexual harassment, that which bases economic benefit on submission to sexual demands, and that which creates a hostile work environment even though it might not directly affect wage loss.³⁰ In addition, the Supreme Court stated that an employer is absolutely liable for the sexual harassment perpetrated by a supervisor, whether or not the employer knew or should have known about the harassing behavior.³¹

The crux of this case rested on whether or not Congress intended psychological harm to provide evidence of sex discrimination as Vinson argued, or whether they were referring only to tangible losses such as salary or other conditions of employment as Meritor proposed.³² The Congressional Record provided little help in clearing up this matter since "sex" was added to Title VII too late to muster any serious debate in the House of Representatives.³³

Relying on Rogers v. EEOC,³⁴ the first case to recognize a cause of action based upon a discriminatory work

²⁹ 29 C.F.R. sec. 1604.11(a) (1985).

³⁰ Meritor at 2403.

³¹ Id.

³² Id. at 2404.

³³ Id.

³⁴ 454 F.2d 234 (CA5 1971), cert. denied, 406 U.S. 957, 92 S.Ct. 2958, 32 L.Ed.2d 343 (1972).

environment,³⁵ the Supreme Court determined that the phrase "terms, conditions, or privileges of employment" referred to more than mere tangible aspects of employment.³⁶ In Rogers, the Fifth Circuit court stated:

[T]he phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.³⁷

Second, the EEOC Guidelines which defined sexual harassment also supported the view that a violation of Title VII could also exist where the injury was noneconomic.³⁸ As the Eleventh Circuit court wrote in Henson v. Dundee:³⁹

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.⁴⁰

³⁵ Meritor at 2405.

³⁶ Id. at 2404.

³⁷ Id. at 2405 quoting Rogers v. EEOC, 454 F.2d 234, 238 (CA5 1971), cert. denied, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972).

³⁸ Id. at 2404.

³⁹ 682 F.2d 897 (1982).

⁴⁰ Id. at 902.

However, both the Rogers and Henson courts agreed that the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in a employee" would not necessarily affect the conditions of employment to the extent that it would violate Title VII.⁴¹ Both courts stated that in order to be actionable, the harassing conduct must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment."⁴²

Another major issue decided by the Supreme Court concerned the voluntariness of the victim's participation in the sexual conduct. The Supreme Court reasoned that the fact that the sex-related conduct was entered into willingly on most instances was not a defense to a Title VII complaint since the gravamen of a sexual harassment complaint is that the sexual advances were "unwelcome."⁴³ The Court did go on to state that even though "voluntariness" is not a defense, it is permissible to allow evidence of the victim's dress or provocative speech when determining whether the victim found the advances unwelcome because the EEOC Guidelines specifically state that the trier of fact must look at "the totality of circumstances, such as the nature of the sexual

⁴¹ Rogers, 454 F.2d, at 238; Henson, 682 F.2d, at 904 (quoting same).

⁴² Meritor at 2405 quoting Rogers and Henson.

⁴³ Id. at 2406.

advances and the context in which the alleged incidents occurred."⁴⁴

Even though the district court did not believe the bank had violated Title VII, the court still went on to address the fact that because the plaintiff did not notify the bank that she had been sexually harassed by her supervisor, the bank could not be liable.⁴⁵ The Court of Appeals, however, disagreed and held that an employer is liable for sexually harassing behavior perpetrated by a supervisor whether the employer knew of the behavior or not.⁴⁶ In its amicus curiae brief, the EROC wrote that when a supervisor acts under the authority given to him by his employer and that supervisor threatens subordinates with actions that will affect their employment, such actions are properly imputed to the employer who gave the supervisor the authority in the first place.⁴⁷ However, the brief goes on to state that "when a sexual harassment claim rests exclusively on a 'hostile environment' theory. . .the usual basis for a finding of agency will often disappear."⁴⁸

⁴⁴ Id. at 2406.

⁴⁵ Id. at 2407.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Id.
. . .a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was

The Supreme Court failed to rule definitively on the liability of an employer for the harassing acts of a supervisor that create a hostile environment in this particular case.⁴⁹ In a concurring opinion, however, Justices Marshall, Brennan, Blackmun and Stevens wrote that there is no justification for the belief that there is no employer liability for hostile environment sexual harassment until the employee suffering from the harassing conduct notifies other supervisors since there is no such requirement in the statute.⁵⁰

reasonably responsive to the employee's complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment. . . . In all other cases, the employer will be liable if it has actual knowledge of the harassment or if, considering all of the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials. Brief for United States and EEOC as Amici Curiae 26.

⁴⁹ Id. at 2408.

⁵⁰ Id. at 2410.

Rabidue v. Osceola Refining Company

The next noteworthy sexual harassment case to be heard came out of the Sixth Circuit. It is so notable because its dissenting opinion became an indicator of the expanding judicial theory discussing sexual harassment which has since become mainstream judicial reasoning in many districts since that opinion was written. In Rabidue v. Osceola Refining Company, A Division of Texas-American Petrochemicals, Inc.,⁵¹ a female who was discharged from her job brought a charge of sexual discrimination against her former employer.⁵² Plaintiff alleged that the harassment arose out of a strained working relationship she had with one of the company's supervisors.⁵³ The supervisor was a crude and vulgar man who often made obscene comments about women and plaintiff, in particular.⁵⁴ Although management was aware of the supervisor's vulgarity, they were unsuccessful at curbing his behavior.⁵⁵

For her part, plaintiff was described as competent, aggressive and opinionated but quick to argue.⁵⁶ Both

⁵¹ 805 F.2d 611 (6th Cir. 1986) (Keith, J., dissenting), cert. denied, 481 U.S. 1041 (1987).

⁵² Id. at 614-15.

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.

supervisors and co-workers found her abrasive, uncooperative, and difficult to get along with.⁵⁷ She was formally discharged from the company as a result of her irascible personality and inability to work with others.⁵⁸

While the Sixth Circuit claimed that they had never before heard a case which solely alleged a hostile work environment with no tangible job detriment, the court did refer to the recent Supreme Court case of Meritor which allowed a plaintiff to pursue a Title VII action based on a hostile work environment.⁵⁹ The appellate court also stated that in order to sustain a claim for a hostile work environment, plaintiff must prove each of the following:

(1) the employee was a member of a protected class; (2) the employee was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based upon sex; (4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that affected seriously the psychological well-being of the plaintiff; and (5) the existence of respondeat superior liability.⁶⁰

The Sixth Circuit differentiated between the two types of sexual harassment by stating that with quid pro quo harassment, one incident could be enough to sustain a sex

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ Id. at 619.

⁶⁰ Id. at 619-20.

discrimination claim.⁶¹ Hostile environment harassment, however, is usually characterized by multiple events of varying severity, one of which might not be enough to sustain a sex discrimination claim.⁶²

The majority discussed the fact that in some work settings sexual jokes and "girlie" magazines may abound and that Title VII was never meant to change that.⁶³ Title VII, the court stated, "is the federal court mainstay in the struggle for equal employment opportunity for the female workers in America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers."⁶⁴

In the instant case, the Sixth Circuit held in favor of the defendant and concluded that although the supervisor's comments were vulgar and annoying, they ". . .were not so startling as to have affected seriously the psyches of the plaintiff or other female employees."⁶⁵ The majority went on to note that the sexually-oriented posters had a minimal effect on the work environment "when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial

⁶¹ Id. at 620.

⁶² Id.

⁶³ Id. at 621.

⁶⁴ Id.

⁶⁵ Id. at 622.

erotica at the newsstands, on prime-time television, at the cinema, and in other public places."⁶⁶

Judge Keith opened his powerful dissent by stating that plaintiff worked in an environment which exhibited an overall anti-female climate.⁶⁷ Judge Keith referred to a number of instances in the court testimony showing that the plaintiff received different treatment from her male co-workers, including not being allowed to take male customers out to lunch "because she might have car trouble" and being told she had set her goals too high when her male counterpart, who had similar goals, was praised for his ambition.⁶⁸

Judge Keith's main point in his dissent was his disagreement with the majority that when considering claims of hostile environment courts should consider the perspective of the reasonable person.⁶⁹ He suggested that in cases of hostile environment sexual harassment courts adopt the perspective of the reasonable woman because the reasonable person fails to take into account the differing views of appropriate sexual conduct between men and women.⁷⁰ Judge Keith stated:

⁶⁶ Id.

⁶⁷ Id. at 623.

⁶⁸ Id. at 624-25.

⁶⁹ Id. at 626.

⁷⁰ Id.

. . .I would have courts adopt the perspective of the reasonable victim which simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant. Moreover, unless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men.⁷¹

The dissent referred back to the majority's statements that Title VII was not meant to change the work environment where crude jokes are plentiful and expected. Judge Keith's dissent stated that the very purpose of Title VII was to prevent attitudes from poisoning the work environment.⁷²

Judge Keith also took issue with the majority's desire to examine the backgrounds of the defendants and other co-workers to determine whether their behavior was reasonable toward the plaintiff based on their backgrounds. Judge Keith found the backgrounds of the defendants irrelevant.⁷³ He further stated that no court would have analyzed the backgrounds of a supervisor who had been accused of racially discriminating against a black employee.⁷⁴

Judge Keith also stated that when the majority referred to society's acceptance of erotic depictions in the media, the court must have been referring to the unenlightened because he could not see how the reasonable woman could

⁷¹ Id.

⁷² Id.

⁷³ Id.

⁷⁴ Id.

condone such exploitation of women by the American culture.⁷⁵ In a particularly expressive passage Judge Keith summed up the importance and necessity of adopting the reasonable woman standard when he stated:

. . .pervasive societal approval thereof and of other stereotypes stifles female potential and instills the debased sense of self worth which accompanies stigmatization. The presence of pin-ups and misogynous language in the workplace can only evoke and confirm the debilitating norms by which women are primarily and contemptuously valued as objects of male sexual fantasy. That some men would condone and wish to perpetuate such behavior is not surprising. However, the relevant inquiry at hand is what the reasonable woman would find offensive, not society, which at one point condoned slavery.⁷⁶

Lipsett v. University of Puerto Rico

Following in the shadows of the majority in Rabidue, Lipsett v. University of Puerto Rico⁷⁷ also failed to find merit in an employee's claims of a hostile environment.⁷⁸ However, like Moire, this sexual harassment case further exposed parallels between both Title IX and Title VII. In Lipsett, a female surgical resident filed suit against the University of Puerto Rico claiming violation of the equal protection and due process clauses of the Fourteenth Amendment, Title IX of the Education Amendments of 1972, and 42 U.S.C. sec. 1983 for sexual harassment she suffered

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ 864 F.2d 881 (1st Cir. 1988).

⁷⁸ Id.

during her residency.⁷⁹ Plaintiff alleged that she was sexually harassed by a supervisor and several medical residents although the residents were not named as defendants.⁸⁰ Plaintiff also claimed that she was dismissed from her residency program because of her sex.⁸¹

This case posed an interesting legal question because although plaintiff was an employee of the university hospital, she was also a student in a residency program and she chose to seek relief through Title IX not Title VII. In determining whether the well-established Title VII principles for proving discriminatory treatment should be applied to Title IX cases of sex discrimination, the First Circuit remarked that their only guidance in these cases was that it must be accorded "a sweep as broad as its language."⁸²

In Lipsett, it appeared that the First Circuit found the application of Title VII principles on this Title IX case easier because of this mixed employment-training situation.⁸³ Therefore, the Lipsett court used the case law which had been developed under Title VII to assess the

⁷⁹ Id. at 884.

⁸⁰ Id. at 895.

⁸¹ Id.

⁸² Id. at 896 quoting North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521, 102 S.Ct. 1912, 1918, 72 L.Ed.2d 299 (1982).

⁸³ Id. at 897.

plaintiff's claims under Title IX and section 1983.⁸⁴ In fact, the court referred to Mabry v. State Bd. of Community Colleges and Occupational Educ.⁸⁵ which stated that "[b]ecause Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination, it would suggest that Title VII is the most appropriate analogue when defining Title IX's substantive standards."⁸⁶

The appellate court in Lipsett agreed with Mabry concerning the importance of relying on ". . . EEOC Guidelines. . . in determining whether a recipient of Federal financial assistance [under Title IX] has engaged in unlawful employment practice."⁸⁷ The First Circuit also relied upon the legislative history of Title IX itself, ". . . which strongly suggests that Congress meant for similar substantive standards to apply under Title IX as have been developed under Title VII."⁸⁸ House Report provides in relevant part:

One of the single most important pieces of legislation which has prompted the cause of equal employment opportunity is Title VII of the Civil Rights Act of 1964. . . . Title VII, however, specifically excludes educational institutions from its terms. [Title IX]

⁸⁴ Id. at 896.

⁸⁵ 813 F.2d 311 (10th Cir.), cert. denied, 484 U.S. 849, 108 S.Ct. 148, 98 L.Ed.2d 104 (1987).

⁸⁶ Lipsett quoting Mabry, 813 F.2d 311, 316 fn.6.

⁸⁷ Id. at 897 quoting 28 C.F.R. sec. 42.604 (1987).

⁸⁸ Lipsett at 897.

would remove that exemption and bring those in education under the equal employment provision.⁸⁹

The Lipsett court went on to state the prima facie case for both quid pro quo and hostile environment sexual harassment as was done in Rabidue.⁹⁰ Under quid pro quo sexual harassment, a plaintiff must prove that he/she (1) was subjected to unwelcome sexual advances by a supervisor or teacher and (2) that his or her reaction to these advances affected tangible aspects of his or her compensation, terms, conditions, or privileges of employment or educational training.⁹¹ In order to prove hostile environment sexual harassment, plaintiff must show that he or she was subjected to unwelcome sexual advances so "severe or pervasive" that it altered his or her working or educational environment.⁹²

Although the appellate court did not find compelling evidence to suggest the plaintiff had suffered from the effects of a hostile environment, the court did reiterate the dissenting opinion of Judge Keith in Rabidue. The First Circuit addressed the importance of keeping both the man's and the woman's perspective in mind or "defendants as well as the courts [will be] permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders,

⁸⁹ Id. quoting H.R.Rep. No. 554, 92nd Cong., 2d Sess., reprinted in 1972 U.S.Code Cong. & Admin. News 2462, 2512.

⁹⁰ Rabidue at 619.

⁹¹ See Henson, 682 F.2d at 909.

⁹² Meritor, 106 S.Ct. at 2406.

in this case, men."⁹³ In addition, the appellate court made particular mention of the fact that, despite the plaintiff's reluctance to file suit against her fellow residents, the sexual harassment by fellow residents could have "given rise to a cause of action against the University under Title IX."⁹⁴

With respect to putting an institution on notice regarding the sexually harassing behavior of other supervisors, the First Circuit, relying on Meritor, held that an educational institution is liable for hostile environment sexual harassment created by a supervisor if an official representing that institution knew, or, in the exercise of reasonable care, should have known, of the harassment's occurrence, unless that official can show that he or she took appropriate steps to halt it.⁹⁵ The court held that this standard also applied to situations in which hostile environment is perpetrated by a plaintiffs' co-workers⁹⁶ which might have greater ramifications for college students who are harassed by their peers.⁹⁷

⁹³ Rabidue v. Osceola Refining Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting), cert. denied, 481 U.S. 1041, 107 S.Ct. 1983, 95 L.Ed.2d 823 (1987).

⁹⁴ Lipsett at 895.

⁹⁵ Lipsett at 901 quoting Katz, 709 F.2d at 256.

⁹⁶ Id.

⁹⁷ To date, the courts have only considered federal claims for sex discrimination due to sexual harassment against institutions. Cannon v. University of Chicago, 441

Bougher v. University of Pittsburgh

Whether the plaintiff was able to prove her prima facie case of sexual harassment or not, the opinions from the aforementioned cases show a judiciary willing to explore and, if necessary, expand the substantive law concerning Title VII and Title IX where Congress had previously been silent. The next case in this legal analysis, Bougher v. University of Pittsburgh,⁹⁹ portrays a more conservative line of judicial reasoning. In Bougher, a female student brought a Title IX action against the University of Pittsburgh claiming she was subjected to sexual harassment by a professor during her graduate studies.⁹⁹ Specifically, Bougher alleged that the university failed to establish and implement grievance procedures redressing sex-based discrimination and, therefore, allowed an environment which was hostile to women to prosper.¹⁰⁰

The court concluded that Bougher failed to show that the university engaged in quid pro quo sexual harassment because she did not prove that the university, or her professor had excluded or denied her benefits on account of

U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). Any action taken against perpetrators in their individual capacities must be brought separately as a Section 1983 civil rights action. Lipsett at 901.

⁹⁸ 713 F.Supp. 139 (W.D.Pa. 1989), aff'd, 882 F.2d 74 (3rd Cir. 1989), cert. denied, 108 S.Ct. 460 (1987).

⁹⁹ Id. at 75-76.

¹⁰⁰ Id. at 76.

her sex.¹⁰¹ In other words, the court viewed Title IX as a remedy for sex discrimination in the admission process of an institution but not as a panacea for discrimination which might occur after a student has been admitted.

Another issue raised by plaintiff in this case was whether or not she could apply the "hostile environment" sexual harassment principles established under Title VII to alleged violations of Title IX.¹⁰² The court failed to find that the "hostile environment" theory established under Title VII applied equally to discrimination via sexual harassment in education under Title IX.¹⁰³ In fact, the court stated that although the question of whether a hostile environment was actionable under Title IX was an important one, they did not find it necessary to come to a decision on this matter.¹⁰⁴ The court held this conservative line of reasoning despite the more expansive legal principles established in Moire four years earlier in the Eastern District of Pennsylvania and upheld per curiam in that circuit.¹⁰⁵

¹⁰¹ Id. at 77.

¹⁰² Id. at 75.

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ Moire at 1367. The court stated that even though sexual harassment doctrine had been established in the context of Title VII, its guidelines were equally applicable to Title IX.

Ellison v. Brady

Ellison v. Brady¹⁰⁶ was one of the first cases which actually addressed the issue of peer or co-worker harassment in the workplace.¹⁰⁷ Ellison appealed the decision of the lower court which rejected her complaint because she failed to show "a pattern or practice of sexual harassment covered by the EEOC regulations."¹⁰⁸

In overturning the lower court's decision, the Ninth Circuit reiterated the concerns of the Supreme Court in Meritor that there is very little congressional debate on the issue of sex discrimination under Title VII.¹⁰⁹ While the trial court found the conduct of Ellison's harasser "isolated and genuinely trivial," the Ninth Circuit disagreed.¹¹⁰ The Ninth Circuit also stated, in direct opposition to the majority opinion of the Sixth Circuit in Rabidue, that it is the harasser's conduct which must be pervasive or severe, not the alteration in the condition of employment.¹¹¹

This appellate court also stated that "employees need not endure sexual harassment until their psychological well-

¹⁰⁶ 924 F.2d 872 (9th Cir. 1991).

¹⁰⁷ Id. at 873-75.

¹⁰⁸ Id. at 875.

¹⁰⁹ Id.

¹¹⁰ Id. at 876.

¹¹¹ Id. at 878.

being is seriously affected to the extent that they suffer anxiety and debilitation."¹¹² In fact, the appellate court intimated that the incorrect reasoning in Rabidue may stem from the misinterpretation of a quote in Meritor taken from Rogers v. EEOC. In its analysis, the Rogers court explained that "[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers."¹¹³ The Rogers court did not hold that a hostile environment only exists when the emotional and psychological stability of workers is completely destroyed but the judge in Rabidue may have believed otherwise.¹¹⁴

The Ninth Circuit opinion also stated that while an isolated epithet by itself fails to support a cause of action for a hostile environment, "Title VII's protection of employees from sex discrimination comes into play long before the point where victims of sexual harassment require psychiatric assistance."¹¹⁵ The appellate court seemed to favor a sliding scale where one can show the existence of a

¹¹² Id.

¹¹³ Meritor, 477 U.S. at 66, 106 S.Ct. at 2405, quoting Rogers, 454 F.2d at 238.

¹¹⁴ Ellison at 878.

¹¹⁵ Id. It should be noted that the same reasoning was used by the Supreme Court in the recent decision of Harris v. Forklift Systems, Inc., 114 S.Ct. 367 (1993).

hostile environment depending upon the frequency of the offenses or their severity.¹¹⁶ In other words, if an incident is severe enough, it could be the sole indicator of a hostile environment.

The Ninth Circuit also addressed the importance of focusing on the perspective of the victim just as Judge Keith's dissent demanded in Rabidue because conduct that men may find unobjectionable may offend some women.¹¹⁷ The appellate court stated:

We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share.¹¹⁸ For example, because women are disproportionately the victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims

¹¹⁶ Id.

¹¹⁷ Id. The court referred to Yates, 819 F.2d at 637, n. 2 which stated that ". . . men and women are vulnerable in different ways and offended by different behavior. . . ."

¹¹⁸ One writer explains:

While many women hold positive attitudes about uncoerced sex, sexual coercion can make women wary of sexual encounters. Moreover, American women have been raised in a society where rape and sex-related violence have reached unprecedented levels, and a vast pornography industry creates continuous images of sexual coercion, objectification and violence. Finally, women as a group tend to hold more restrictive views of both the situation and type of relationship in which sexual conduct is appropriate. Because of the inequality and coercion with which it is so frequently associated in the minds of women, the appearance of sexuality in an unexpected context or a setting of ostensible equality can be an anguishing experience. Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 Vand.L.Rev. 1183, 1205 (1989).

of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.¹¹⁹

In reaching its conclusion, the Ninth Circuit relied on the perspective of the reasonable woman because it believed that the gender-neutral reasonable person standard tended to be male-biased and systematically ignored the experiences of women.¹²⁰ The instant court answered a major concern of the opponents of the reasonable woman standard when it defended this standard by saying that it does not create a higher standard of protection for women than for men.¹²¹ The appellate court stressed that the reasonable woman standard is not static and that it is subject to change along with the changing standards of acceptable behavior.¹²² Although acknowledging the perspective of the victim means that conduct can be labeled as sexual harassment even if the harasser did not intend it to be so, it is still consistent with Title VII which is not fault-based, like a civil action. "Title VII is aimed at the consequences or effects of an employment practice and not at the . . . motivation of

¹¹⁹ Id. at 879.

¹²⁰ Id.

¹²¹ Id.

¹²² Id.

co-workers or employers."¹²³ After examining Ellison, it appears that the judicial reasoning of the majority in the Ninth Circuit came from the dissent of the minority in the Sixth Circuit.

Franklin v. Gwinnett County Public Schools

The next sexual harassment case of major importance was decided by the United States Supreme Court. In Franklin v. Gwinnett County Public Schools,¹²⁴ the Court addressed the issue of whether Title IX supported a claim for monetary damages despite the fact that the statute does not specifically authorize such an award.¹²⁵ In the instant case Hill, a high school teacher/coach, began sexually harassing Franklin, a high school student, when she was a sophomore.¹²⁶ The harassment occurred over a two year period beginning with Hill asking about her sexual experiences with her boyfriend and culminating in coerced sexual intercourse in his office during school hours.¹²⁷

While the Eleventh Circuit dismissed the suit, the Supreme Court relying on Cannon v. University of Chicago,¹²⁸

¹²³ Id. at 880 quoting Rogers, 454 F.2d at 239.

¹²⁴ 911 F.2d 617 (11th Cir. 1990), rev'd, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992).

¹²⁵ Id. at 1031-32.

¹²⁶ Id. at 1031.

¹²⁷ Id.

¹²⁸ 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979).

held that Title IX is enforceable through an implied right of action.¹²⁹ The Court added that ". . . federal courts may use any available remedy to make good the wrong done."¹³⁰ In other words, absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.¹³¹

Patricia H. v. Berkeley Unified School District

Patricia H. v. Berkeley Unified School District,¹³²

seemed to follow suit with what appeared to be a shift toward the acceptance of the hostile environment as an actionable form of sexual harassment in education. In Patricia H., a mother of two children brought a Title IX suit against a school district alleging hostile environment sexual harassment¹³³ when a school teacher, whom the mother had been dating, allegedly began sexually abusing the children who were also students at the teacher's school.¹³⁴ The lawsuit alleged that the mere presence of the teacher in the school the girls were attending, or would have attended

¹²⁹ Franklin at 1032.

¹³⁰ Bell v. Hood, 327 U.S. 678, 684, 66 S.Ct. 773, 777, 90 L.Ed. 939 (1946).

¹³¹ Franklin at 1029.

¹³² 830 F.Supp. 1288 (N.D.Cal. 1993).

¹³³ Id. at 1289.

¹³⁴ Id. at 1294-96.

but for the teacher, created a hostile environment and denied the young girls of their right to full participation and enjoyment of their education within the school district.¹³⁵

Although the District Court for the Northern District of California stated that the issue of sex discrimination based on a hostile environment in an educational setting was a novel question in their district, the court was not completely without guidance on the issue relying on other civil rights legislation such as Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. ss 2000d, 2000e-2(a)(1).¹³⁶ In fact, Title IX was patterned after Title VI of the Civil Rights Act of 1964.¹³⁷ The district court reasoned however, that because there is a great deal more case law involving sex discrimination claims under Title VII than under Title VI and because Title VII prohibits the same conduct as Title IX, appellate courts have turned to the "substantial body of case law developed under Title VII" for assistance in interpreting Title IX.¹³⁸

The district court found a clear parallel between academic advancement based upon submission to sexual demands in the education setting and job retention or promotion

¹³⁵ Id. at 1295-96.

¹³⁶ Id. at 1290.

¹³⁷ Id.

¹³⁸ Id.

based upon submission to sexual demands in the employment setting.¹³⁹ In this particular case, the plaintiffs asked the district court to recognize that, just as Title VII bans a hostile environment as sex discrimination in the workplace, Title IX bans sex discrimination as well and, therefore, the creation of a hostile environment in the education setting is sexual harassment, a form of sex discrimination, and is violative of Title IX.¹⁴⁰ The defendants, however, argued that Title IX does not encompass hostile environment claims and the court should leave it to the legislature "to enact such an extension of the law."¹⁴¹

In analyzing such cases some courts, such as those in the First Circuit, have applied the Meritor analysis of hostile environment claims to decide the liability of an educational institution under Title IX:

We therefore hold, following Meritor, that in a Title IX case, an educational institution is liable upon a finding of hostile environment sexual harassment perpetrated by its supervisors upon employees if an official representing that institution knew, or . . . should have known, of the harassment's occurrence, unless that official can show that he or she took appropriate steps to halt it.¹⁴²

¹³⁹ Id. at 1290-91.

¹⁴⁰ Id. at 1291.

¹⁴¹ Id.

¹⁴² Id. quoting Lipsett, 864 F.2d at 898-901, 901; see also Moire, 613 F.Supp. at 1366-70.

It appears the only exceptions to the analysis of such cases occurred in the United States District Court for the Western District of Pennsylvania, which failed to find that Title IX permits a claim based on a hostile environment due to a lack of guiding administrative regulations although the district does support claims of quid pro quo sexual harassment.¹⁴³ This opinion was affirmed on appeal to the Third Circuit.¹⁴⁴

Although the Supreme Court in Franklin declined to apply Title VII analysis to the Title IX case, it did acknowledge that "a student should have the same protection in school as an employee has in the workplace."¹⁴⁵ The district court in Patricia H. went even further in stating that the distinctions between the workplace and the school environment show the importance of protecting students against sex discrimination in the schools:

[T]he importance and function of environment is different in academia than in the workplace. . . . A nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A

¹⁴³ Id. In a footnote which addresses Bougher v. University of Pittsburgh, 713 F.Supp. 139, 145 fn.3. The court stated that while there may be no administrative regulations, the Office of Civil Rights ("OCR") of the Department of Education which enforces Title IX has repeatedly applied the definitions of sexual harassment developed in Title VII context to analyze complaints against educational institutions.

¹⁴⁴ Bougher v. University of Pittsburgh, 882 F.2d 74 (3rd Cir. 1989).

¹⁴⁵ Patricia H. at 1292 fn.5.

sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program.¹⁴⁶

In fact, the district court asked that a higher standard of behavior be imposed upon a faculty member toward his/her students than the standard imposed in the workplace between an employer and an employee because ". . . [T]he student-faculty relationship encompasses a trust and dependency that does not inherently exist between parties involved in a sexual harassment claim under Title VII."¹⁴⁷

Doe v. Petaluma City School District

Also springing from the Northern District of California is Doe v. Petaluma City School District, the first Title IX case to address the issue of student-to-student sexual harassment in a K-12 setting.¹⁴⁸ In Doe, a high school student brought a Title IX action against a school district alleging that administrators failed to stop her from being sexually harassed by other students.¹⁴⁹

Plaintiff went to her counselor about every other week to get him to stop the harassment which was mostly verbal.¹⁵⁰ Her counselor said all he could do was warn the students and

¹⁴⁶ Id. at 1292-93.

¹⁴⁷ Id. at 1293.

¹⁴⁸ 830 F.Supp. 1560 (N.D.Cal. 1993).

¹⁴⁹ Id. at 1563-65.

¹⁵⁰ Id. at 1564.

never told Doe or her parents about the Title IX Student/Parent Grievance Policy.¹⁵¹ The counselor also told Doe that girls could not get into trouble for making sexual comments because girls could not sexually harass other girls.¹⁵² The counselor told Doe's father "boys will be boys" and there was little he could do since no one actually hit Doe.¹⁵³ When the counselor was finally asked why he never told the district's Title IX representative about the situation he replied that he "didn't feel it was important."¹⁵⁴

The District Court for the Northern District of California found in favor of the school district and concluded that while hostile environment sexual harassment claims may be brought under Title IX, in order to receive damages, one must prove intentional discrimination by an employee of the educational institution based on sex, not simply that an employee or employees of the institution knew or should have known of the hostile environment and failed to take appropriate action to end it.¹⁵⁵ This decision clearly placed a higher burden of proof on the part of the

¹⁵¹ Id.

¹⁵² Id.

¹⁵³ Id. at 1565.

¹⁵⁴ Id.

¹⁵⁵ Id. at 1571.

alleged victim in the educational setting than on an alleged victim of co-worker sexual harassment in the workplace.

Harris v. Forklift Systems, Inc.

The most recent sexual harassment case heard by the United States Supreme Court is Harris v. Forklift Systems, Inc.¹⁵⁶ and came on appeal from the United States District Court for the Middle District of Tennessee. In Harris, an employee sued her employer in a Title VII suit claiming hostile environment sexual harassment.¹⁵⁷ The district court judge ruled that Harris was not the victim of sex discrimination via sexual harassment because the harassing conduct did not interfere with Harris's work performance and did not "seriously affect her psychological well-being."¹⁵⁸ The district court judge analogized this case to Rabidue¹⁵⁹ when justifying his reasoning because both cases dealt with the conduct of one person who was vulgar and crude but did not sexually proposition or touch the alleged victims.¹⁶⁰ The judge in Harris also added that in Rabidue, the plaintiff was at least able to show that other women were offended by the conduct whereas Harris could not.¹⁶¹

¹⁵⁶ 114 S.Ct. 367 (1993).

¹⁵⁷ Id.

¹⁵⁸ Id. at 369-70.

¹⁵⁹ 805 F.2d 611 (6th Cir. 1986).

¹⁶⁰ Harris at 369-70.

¹⁶¹ Id. at 370.

On appeal to the United States Supreme Court, the decision of the district court was overturned.¹⁶² The Supreme Court, in a unanimous opinion written by Justice O'Connor less than one month after oral arguments were heard stated:

. . .a discriminatorily abusive work environment, even one that does not seriously affect the psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.¹⁶³

Justice O'Connor reasoned that the hostility of an environment can depend upon a number of things such as the frequency of the conduct, its severity, whether it is physically threatening or humiliating, or whether it unreasonably interferes with an employee's work performance and, while psychological harm can be taken into account, no single factor is required.¹⁶⁴

Hastings v. Hancock

In Hastings v. Hancock,¹⁶⁵ a student brought a Title IX suit alleging sexual harassment by the man who ran the

¹⁶² Id. at 371.

¹⁶³ Id. at 370-71.

¹⁶⁴ Id. at 371.

¹⁶⁵ 842 F.Supp. 1315 (D.Kan. 1993).

hairstyling school she was attending.¹⁶⁶ The issue in this case was when does a school become liable for the acts of sexual harassment by one of its employees under Title IX?¹⁶⁷ The defendant's argument was based on a prior case from the Middle District of Georgia¹⁶⁸ which held that Title VII's agency principles should not provide a basis for liability on the part of a school because, even if agency principles prevailed, an institution could not be held liable for actions outside the scope of the employee's authority.¹⁶⁹ The District Court for Kansas disagreed with this reasoning.

Partly basing its reasoning on Patricia H., the Kansas court applied Title VII analysis to its Title IX claim.¹⁷⁰ The district court specifically noted that the Office of Civil Rights in the Department of Education, which is charged with enforcing compliance with Title IX, has

¹⁶⁶ Id. at 1316-17.

¹⁶⁷ Id. at 1317.

¹⁶⁸ Floyd v. Waiters, 831 F.Supp. 867, 876 (M.D.Ga. 1993). A Section 1983 case brought on behalf of a student who had been raped by a security guard employed by the school district. The importance of this case lies in its discussion of Title IX and the applicability of agency principles in assessing liability for wrongdoing. The district court concluded that common-law agency principles did not apply to Title IX cases. However, even if agency principles did apply, an employer cannot be held liable for the conduct of an employee which falls outside the scope of his/her employment.

¹⁶⁹ Id.

¹⁷⁰ Patricia H., 830 F.Supp. at 1291.

repeatedly applied Title VII sexual harassment law when analyzing complaints against educational institutions.¹⁷¹

While the Tenth Circuit has held that claims of hostile environment sexual harassment should be analyzed in accordance with agency principles,¹⁷² it has also noted that a plaintiff will almost never prevail with such a standard because "(s)exual harassment simply is not within the job description of any supervisor or any other worker in any reputable business."¹⁷³

Hastings contended that the school's potential liability lay in another standard set out by the Tenth Circuit: authority or agency relationship aiding the harasser.¹⁷⁴ Restatement (Second) of Agency s 219(2)(d) provides that:

a master may be liable for the acts of a servant acting outside the scope of delegated authority if the servant purported to act on behalf of the principle and there was reliance on that apparent authority, or, if the servant was aided in accomplishing the tort by the existence of the agency relationship.¹⁷⁵

Moreover, the district court noted that in many cases decided under Title VII, courts have held that an act of a supervisor with direct authority over the victim of the

¹⁷¹ Id. at 1291 fn.3.

¹⁷² Hastings at 1318.

¹⁷³ Hicks, 833 F.2d at 1417-18.

¹⁷⁴ Hastings at 1319.

¹⁷⁵ Id.

harassment makes an employer directly liable for any violations of Title VII.¹⁷⁶

Synthesis and Findings Related to Question 1

Alexander v. Yale University¹⁷⁷ was the first case to address the issue of sexual harassment of students in higher education. Although none of the five female plaintiffs were successful in sustaining their Title IX claims on appeal, several important points concerning sexual harassment, in general, were raised in this suit.

For the first time, Title IX had been used as a tool for protecting the campus environment against sexual harassment and its harmful effects.¹⁷⁸ The appellants requested campus administrators to establish a sexual harassment policy which was required by legislation enacted subsequent to section 1681 of Title IX.¹⁷⁹ The suit went further by claiming that failure to establish grievance procedures had the effect of actively condoning the sexually harassing behavior.¹⁸⁰ While the Second Circuit did agree that Yale's grievance procedures were inadequate, the court

¹⁷⁶ Id.

¹⁷⁷ 631 F.2d. 178 (2nd Cir. 1980).

¹⁷⁸ Id. at 181.

¹⁷⁹ According to section 1682, H.E.W. requires educational institutions receiving federal funds to adopt grievance procedures which would provide for prompt and equitable resolution of both student and employee complaints prohibited by section 1681. 45 C.F.R. section 86.-8(b).

¹⁸⁰ Alexander at 181.

refused to enjoin the institution to establish a different procedure.¹⁸¹

Alexander also addressed the spectrum of sexually harassing behaviors from exchanging grades for sexual favors to the poisoning of the campus atmosphere because of the pervasiveness of the harassment and the lack of a campus-created forum to seek relief for these claims.¹⁸² Although Price's claim was dismissed for lack of proof, the Second Circuit did state that "academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education."¹⁸³ In other words, quid pro quo sexual harassment is a violation of Title IX of the Education Amendments of 1972.

However, the dismissal of the additional students' claims because they did not experience personal exclusion from a federally funded program, or the personal denial of full participation in any program or activity¹⁸⁴ revealed the premature view which courts held regarding the scope of Title IX and the meaning of "full participation." For example, in 1980 the Second Circuit stated that, under Title IX, relief could not be extended to such "imponderables" as

¹⁸¹ Id. at 183.

¹⁸² Id. at 182.

¹⁸³ Id.

¹⁸⁴ Id.

atmosphere.¹⁸⁵ Just five years later, this very type of sexual harassment--hostile environment sexual harassment--was recognized by a district court in Pennsylvania.¹⁸⁶

It should be noted that the Second Circuit also dismissed claims based on the inability to grant appropriate relief because by the time the case was heard, all but one of the plaintiffs had graduated.¹⁸⁷ The issue of expansion of appropriate remedies for victims of sexual harassment in education would not be addressed again until twelve years later.¹⁸⁸

As previously stated, the next sexual harassment case in education was Moire v. Temple University School of Medicine.¹⁸⁹ In this case, the plaintiff did not prevail in her Title IX suit which alleged that she had been sexually harassed by her faculty supervisor; and that receipt of a failing grade during her psychiatric rotation was arbitrary and capricious.¹⁹⁰

¹⁸⁵ Id.

¹⁸⁶ Moire v. Temple University School of Medicine, 613 F.Supp. 1360 (D.C.Pa. 1985).

¹⁸⁷ Alexander at 184. The court stated that the grievants' graduations prevented the court from awarding appropriate relief because the injury--deprivation of an educational environment free from sexual harassment--was a moot point by the time of this appeal.

¹⁸⁸ Franklin v. Gwinnett County, 112 S.Ct. 1028 (1992).

¹⁸⁹ 613 F.Supp. 1360.

¹⁹⁰ Id. at 1377.

However, in the years which had passed between Alexander and Moire, it appeared that the judiciary was taking steps to expand their knowledge-base concerning sexual harassment. Indeed, the district court opened its discussion of Moire's discrimination claim with a definition of sexual harassment taken from Catharine MacKinnon's Sexual Harassment of Working Women, the first scholarly work to develop the concept that sexual harassment is sex discrimination and, therefore, a violation of federal legislation.¹⁹¹

The district court then went on to list and define the two recognized types of sexual harassment--quid pro quo and hostile environment.¹⁹² It is interesting to note that where the Second Circuit court had difficulty seeing the injury from such "imponderables" as atmosphere,¹⁹³ the district court in Pennsylvania seemed to accept the notion of hostile environment sexual harassment without reservation.¹⁹⁴

Another important development in the legal evolution of Title IX came out of a footnote in the Moire case. In it, the district court stated that although sexual harassment "doctrine" has been developed, thus far, in the context of

¹⁹¹ Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (New Haven: Yale University Press, 1979).

¹⁹² Moire at 1366.

¹⁹³ Alexander at 182.

¹⁹⁴ Moire at 1366.

Title VII, the established guidelines seem equally applicable to Title IX as well.¹⁹⁵

Further expansion of the legal theory concerning sexual harassment came a year later with the case of Meritor Savings Bank, FSB v. Vinson¹⁹⁶ in which the Supreme Court officially sanctioned the legal concept that sexual harassment which creates a hostile environment is sex discrimination and, therefore, actionable under Title VII.¹⁹⁷

The Supreme Court also addressed the issue of whether recovery under Title VII was limited to loss of tangible job benefits. The Court concluded that the phrase "terms, conditions, or privileges of employment" referred to more than tangible job benefits.¹⁹⁸ The Court's decision concerning noneconomic harm has become crucial to the expansion of legal theory involving sexual harassment. By taking this step, the Supreme Court recognized that the harm caused by psychological trauma associated with sexual harassment is worthy of recovery whether or not the victim suffers some tangible loss of job benefits.

Another important point which the Meritor discussed was the "voluntariness" of victim's conduct since she was not

¹⁹⁵ Id. at 1367 fn. 2.

¹⁹⁶ 106 S.Ct. 2399 (1986).

¹⁹⁷ Id.

¹⁹⁸ Id. at 2404.

forced to participate against her will.¹⁹⁹ The Supreme Court concluded a victim's voluntary conduct is not a defense to a sexual harassment suit since "[T]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'"²⁰⁰ which they were in the Meritor case.

Although the Supreme Court in Meritor seemed to be taking bold strides forward in their creation of legal parameters for sexual harassment claims, the Court appeared to cling to some traditional notions about appropriate conduct for women in at least one area. While the Court determined that "voluntariness" was not a defense to a sexual harassment claim, they did conclude that evidence of a victim's provocative dress or speech could be used to determine whether she found the advances to be unwelcome because the EEOC Guidelines emphasized the importance of looking at the record as a whole.²⁰¹

That same year, a sexual harassment case was decided in the Sixth Circuit which would have lasting effects on sexual harassment case law. In Rabidue v. Osceola Refining Company, the appellate court refused to recognize the discharged female's claim as recoverable under Title VII.²⁰² Its dissenting opinion was used as the basis for the

¹⁹⁹ Id. at 2406.

²⁰⁰ Id.

²⁰¹ Id.

²⁰² 805 F.2d 611 (6th Cir. 1986).

majority opinion in the Ellison²⁰³ case five years later in the Ninth Circuit.

It is in Judge Keith's dissent in Rabidue, that the reasonable woman concept is alluded to for the first time as a possible legal standard for determining liability.²⁰⁴ In Judge Keith's opinion, the reasonable person standard is unworkable in cases of sexual harassment because the reasonable person fails to take into account the differing sociological experiences between men and women.²⁰⁵

Furthermore, Judge Keith suggested that the failure of our legal system to adopt the reasonable woman standard would be sanctioning "ingrained notions of reasonable behavior fashioned by the offenders, in this case, men."²⁰⁶

While the majority opinion in Rabidue stated that many workplaces are filled with sexual jokes and "girlie" magazines, Title VII was not intended to completely alter workplace social mores.²⁰⁷ On the contrary, Judge Keith stated that this was exactly why Title VII was created.²⁰⁸ Although this type of conduct may have been permitted in the workplace at one time, Judge Keith believes this should no

²⁰³ Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

²⁰⁴ Rabidue at 626.

²⁰⁵ Id.

²⁰⁶ Id.

²⁰⁷ Id. at 621.

²⁰⁸ Id. at 627.

longer be the case because society is constantly evolving. For example, Judge Keith mentions that our society also condoned slavery at one point.²⁰⁹

Two years later, in 1988, the First Circuit reversed and remanded the decision by a lower court which failed to find merit in the sexual harassment claims proffered by a medical resident at the University of Puerto Rico.²¹⁰ The significance of the Lipsett case was that it furthered the court's acknowledgement of the parallels between Title VII and Title IX. In fact, the First Circuit stated that the case law which has evolved around Title VII is the most appropriate basis for establishing substantive standards around Title IX because both federal statutes prohibit identical conduct.²¹¹ The First Circuit also referred to Congressional intent for the justification of establishing such parallels between Title VII and Title IX.²¹²

However, the First Circuit was only willing to extend this parallel in the context of employment discrimination.²¹³ In other words, the court felt comfortable extending such substantive parameters to plaintiff's Title IX claim because

²⁰⁹ Id.

²¹⁰ Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988).

²¹¹ Id. at 896 quoting Mabry, 813 F.2d 311, 316 fn.6.

²¹² See supra note 88.

²¹³ Lipsett at 897.

as a medical resident, she was both a student and an employee of the University of Puerto Rico. It is possible that, if plaintiff were not an employee, the appellate court might not have been so willing to acknowledge such a parallel between these anti-discrimination statutes.

It is important to note that the First Circuit also addressed the ability of the plaintiff to bring suit against her colleagues under Title IX.²¹⁴ Although it was only mentioned in two sentences in the opinion, the court stated that the sexual harassment perpetrated by the male residents against the plaintiff could have given rise to a cause of action under Title IX.²¹⁵ Based on the court's willingness to draw a parallel between Title VII and Title IX because of the employment aspect of the resident's training, it seems likely that the court's recognition of plaintiff's ability to sue her co-residents stemmed from the co-worker relationship, not the co-student relationship.

The First Circuit quoted Judge Keith's dissent in Rabidue and mentioned the importance for the finder of fact of keeping both the man's and woman's perspectives in mind when assessing sexual harassment claims.²¹⁶ The reference to a dissenting opinion which occurred in a different circuit only two years earlier demonstrates the dynamic nature of

²¹⁴ Id. at 895.

²¹⁵ Id.

²¹⁶ Id. at 898.

the legal system which can expand and change with the court's knowledge-base on a particular topic of social importance.

The Lipsett case did establish a standard for institutional liability in Title IX cases. The First Circuit held that in cases of a hostile environment, an institution is liable for the sexually harassing acts perpetrated by a supervisor or co-worker upon an employee if an official representing the institution knew or should have known of the harassment and failed to take appropriate action to stop it.²¹⁷

Bougher v. University of Pittsburgh²¹⁸ provides a good example of how the judicial reasoning established in one judicial circuit may or may not be utilized by another circuit in analyzing a factually similar case. The issue in Bougher was whether the hostile environment principles established for Title VII could be applied to Title IX cases.²¹⁹ The appellate court concluded that there was no reason to suggest that legal principles concerning hostile environment established under Title VII should apply to hostile environment cases in education under Title IX.²²⁰ Despite the fact that the Lipsett opinion had been handed

²¹⁷ Id. at 901.

²¹⁸ 882 F.2d 74 (3rd Cir. 1989).

²¹⁹ Id. at 75.

²²⁰ Id. at 77.

down in the First Circuit nearly eleven months earlier including case law and congressional opinion which tended to suggest strong parallels between Title VII and Title IX, the Lipsett opinion was not addressed in Bougher.

The Lipsett court noted that the plaintiff missed the opportunity to sue her co-worker residents. Four years later, with the case of Ellison v. Brady, a plaintiff was actually successful in bringing a suit against a co-worker for sexual harassment.²²¹ The Ninth Circuit's opinion in Ellison further tried to explicate the ambiguous language which had arisen in earlier opinions concerning how hostile an environment must be or how severely a plaintiff must be harmed in order to recover in a sexual harassment suit.

The Ninth Circuit stated that when assessing harassment cases, the perpetrator's conduct must be "severe or pervasive," not the alteration in the condition of employment.²²² This opinion appeared to disagree with the majority opinion in Rabidue handed down five years earlier which concluded that, in order to recover, a plaintiff's psyche must be "severely affected."²²³ In other words, the Ninth Circuit was saying that a plaintiff need not suffer sexual harassment to the point of psychological debilitation

²²¹ 924 F.2d 872 (9th Cir. 1991).

²²² Id. at 878.

²²³ Rabidue at 623.

in order to recover because Title VII should protect such a plaintiff before that would occur.²²⁴

One of the most significant points discussed in the Ellison opinion in terms of its contribution to the dynamic legal theory of sexual harassment law is the majority's acceptance of the reasonable woman standard. Discussed for the first time by the dissenting opinion in Rabidue,²²⁵ the majority in Ellison used very similar reasoning in determining that the reasonable woman standard should be applied when deciding sexual harassment suits.²²⁶ The majority points out that this standard will not address conduct which some women may find offensive but because this standard is dynamic, as the views of the reasonable woman

²²⁴ Ellison at 878.

²²⁵ Rabidue at 626.

²²⁶ Ellison at 879. One writer states:

While many women hold positive attitudes about uncoerced sex, their greater physical and social vulnerability to sexual coercion can make women wary of sexual encounters. Moreover, American women have been raised in a society where rape and sex-related violence have reached unprecedented levels, and a vast pornography industry creates continuous images of sexual coercion, objectification and violence. Finally, women as a group tend to hold more restrictive views of both the situation and type of relationship in which sexual conduct is appropriate. Because of the inequality and coercion with which it is so frequently associated in the minds of women, the appearance of sexuality in an unexpected context or a setting of ostensible equality can be an anguishing experience. Id. at n. 9.

change, so will the standards of what constitutes acceptable behavior.²²⁷

Just one year after the Ninth Circuit decided Ellison, the Supreme Court heard its next sexual harassment case.²²⁸ Franklin was the first, and as yet, the only Title IX suit to reach the Supreme Court level. The issue decided in Franklin was whether or not Title IX supported a claim for monetary relief although Congress did not specify such an award in the statute.²²⁹

Since the plaintiff had already graduated from the high school and the perpetrating harasser was no longer a teacher at the school, money damages would be the only way to provide the victim relief. Relying on Bell v. Hood,²³⁰ the Supreme Court concluded that federal courts may use any available means to address a legal wrong.²³¹ Therefore, absent a stated alternative intent by Congress, federal courts could award Franklin any relief they deemed appropriate.

One of the most recent Title IX suits stemming from the educational sphere is the case of Patricia H. v. Berkeley

²²⁷ Id. at n. 12.

²²⁸ Franklin v. Gwinnett County Public Schools, 112 S.Ct. 1028 (1992).

²²⁹ Id. at 1031-32.

²³⁰ 66 S.Ct. 773 (1946).

²³¹ Id.

Unified School District²³² originating in the Northern District of California. In Patricia H., the district court acknowledged that although Title IX was patterned after Title VI, there was a great deal more case law involving sex discrimination under Title VII and so the court chose to rely on the case law developed under Title VII for assistance in analyzing their Title IX.²³³

While the defense in Patricia H. argued that hostile environment was not mentioned in Title IX and, therefore, such conduct should not be protected by the statute, the district court relied on the Supreme Court's analysis of Meritor to determine that an educational institution is liable for a hostile environment if sexual harassment is perpetrated by a supervisor upon employees if an official knew, or should have known, of the conduct and failed to take appropriate steps to halt it.²³⁴

Even more significant than the district court's acceptance of the actionability for a hostile environment under Title IX in the educational setting is the district court's call for a higher standard of conduct on the part of educational institutions than in the workplace because of the important part the environment plays in the educational

²³² 830 F.Supp. 1288 (N.D.Ca. 1993).

²³³ Id. at 1290.

²³⁴ Id. at 1291 quoting Meritor at 2407.

setting.²³⁵ A nondiscriminatory environment is necessary for students to reach their potential through their full participation in the academic institution.²³⁶ The district court went further by stating that the relationship between faculty member and students is based on trust which does not inherently exist in the workplace.²³⁷

Barely a month later another sexual harassment case came out of the Northern District of California. Doe v. Petaluma City High School²³⁸ was the first published case to address the issue of student-to-student sexual harassment in education. Doe brought suit under Title IX claiming that school administrators failed to stop the sexually harassing treatment she was receiving at the hands of other students--both boys and girls.²³⁹

Doe went to her guidance counselor about once a week but he told her there was nothing he could do because the students were only verbally harassing her.²⁴⁰ The counselor also told her that girls could not sexually harass other girls.²⁴¹ The guidance counselor never told Doe or her

²³⁵ Id. at 1292-93.

²³⁶ Id.

²³⁷ Id. at 1293.

²³⁸ 830 F.Supp. 1560 (N.D.Ca. 1993).

²³⁹ Id. at 1563-65.

²⁴⁰ Id. at 1564.

²⁴¹ Id.

parents about the school district's Title IX Student/Parent Grievance Policy, nor did he tell the school district's Title IX representative because he believed the recurring situation to be "unimportant."²⁴²

The district court concluded that even though Title IX claims can be brought to redress the wrongs caused by a hostile environment, in order to recover, a plaintiff must not only show the institution knew of the harassment and failed to take appropriate steps to end it, the plaintiff must show that the institution deliberately failed to take the appropriate steps because of the plaintiff's sex.²⁴³

Although Ellison v. Brady is the leading Title VII case from the Ninth Circuit, its principles are equally applicable to Title IX cases because the statutes are meant to stop the same types of behavior.²⁴⁴ In Ellison, an employment case, the appellate court held that when co-worker sexual harassment is alleged, the employer must take action "reasonably calculated to end the harassment."²⁴⁵ In evaluating the adequacy of the remedy, the court may take into account the ability of the employer or institution to stop harassment by the person[s] engaging in the

²⁴² Id. at 1565.

²⁴³ Id. at 1571.

²⁴⁴ Id. at 1572.

²⁴⁵ Id. quoting Ellison at 882.

harassment.²⁴⁶ The Ninth Circuit also noted that employers are not strictly liable "for failure to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known."²⁴⁷

What makes Doe such an important case is that while the issue of sex discrimination created by a hostile environment in education has occurred in instances involving teachers/administrators harassing students, as yet no court has addressed the question of whether student-to-student sexual harassment is actionable under Title IX.²⁴⁸ However, a letter by the Office for Civil Rights found Title IX violations at the school based on this incident and took the position that if an educational institution fails to take appropriate steps to end student-to-student sexual harassment of which it has knowledge, it is a violation of Title IX.²⁴⁹

The question before the district court in Doe then was whether a harassed student needed to show that an institution knew of the harassment and failed to take

²⁴⁶ Id.

²⁴⁷ Id. quoting Ellison at 881.

²⁴⁸ Id.

²⁴⁹ Id. While a Letter of Finding should not be given the same degree of weight as formal regulations, they do come from an agency charged with enforcing Title IX and so should be given some amount of deference.

appropriate steps to stop it, or whether the institution must have intentionally failed to stop the harassment because of the victim's sex in order to recover damages. Referring back to the case record in Franklin, the school administrators and teachers were aware of the teacher's harassing activities but took no action to stop it and even tried to discourage the plaintiff from pursuing her claims.²⁵⁰ Relying on a Title VII analysis, the Supreme Court would have likely ruled that the school district was subject to liability because it knew of the hostile environment and failed to take reasonable actions to stop it.²⁵¹

In Doe however, the sexual harassment was perpetrated by students, not by employees of the school district.²⁵² Plaintiff asserts that the school district should be liable in this case based on a Title VII analysis because the school district knew of the harassment but failed to take appropriate steps to end it.²⁵³ The district court did not agree with this analysis. Since the plaintiff no longer attended the school, an injunction was not an appropriate remedy and the court held that no damages could be obtained

²⁵⁰ Id. quoting Franklin, 911 F.2d at 618-19 and 112 S.Ct. at 1031, 117 L.Ed.2d at 115.

²⁵¹ Id.

²⁵² Id. at 1576.

²⁵³ Id.

under Title IX merely for a school district's failure to take appropriate action in response to complaints of student-to-student sexual harassment.²⁵⁴ Rather, the school district must be found to have intentionally discriminated against the plaintiff student on the basis of sex.²⁵⁵ Thus, a plaintiff student could only proceed against a school district by claiming that its failure to take appropriate action in the face of student-to-student sexual harassment was based on an actual intent to discriminate against the student on the basis of sex.²⁵⁶ This places a higher standard of proof on a student in an educational setting than on an employee in the workplace.²⁵⁷

One of the more recent sexual harassment cases to reach the Supreme Court was Harris v. Forklift Systems, Inc.²⁵⁸ The Harris case was granted certiorari to determine how hostile an environment must be in order for a plaintiff to recover for a claim of sexual harassment.²⁵⁹ As the Supreme Court noted, the lower court in Harris had agreed with the majority opinion in Rabidue that although there was

²⁵⁴ Id.

²⁵⁵ Id.

²⁵⁶ Id.

²⁵⁷ "Courts Affirm Title IX Coverage of Hostile Environment Sexual Harassment," About Women on Campus 3, No. 1 (Winter 1994): 2-3.

²⁵⁸ 114 S.Ct. 367 (1993).

²⁵⁹ Id.

harassing conduct taking place, it was not hostile enough to allow for recovery because it did not interfere with plaintiff's work performance and did not "seriously affect her psychological well-being."²⁶⁰

Justice O'Connor, writing for a unanimous court, wrote that the failure to create an environment that does not seriously affect the psychological well-being of a plaintiff does not preclude the environment from being labeled hostile.²⁶¹ The Supreme Court concluded that although severely affecting the psyche can be one way to determine the hostility of a sexually harassing environment, there are a number of other factors which may be used as a measuring stick such as the severity of the conduct, the frequency of the conduct, and whether the conduct is physically threatening or humiliating.²⁶² While all of these factors may be present in any hostile environment, just because one of these elements may be missing, does not mean the environment is not hostile.²⁶³

Such a holding by the Supreme Court certainly eases the burden of proof on the part of the plaintiff in a sexual harassment claim. In judicial districts that required that the conduct must "severely affect the psychological well-

²⁶⁰ Id. See also Rabidue at 611.

²⁶¹ Id. at 371.

²⁶² Id.

²⁶³ Id.

being," plaintiff had to almost prove they had a nervous breakdown in order to recover under Title VII. In addition, a plaintiff who had an incredibly stable constitution might never be able to prove that she had been subjected to a hostile working environment because she had never suffered severe psychological trauma. This ruling by the Supreme Court acknowledges that an environment can be hostile long before it reaches the point of severely affecting the victim's psyche thus causing psychological distress. In addition, such a holding seems to reiterate the personal way in which each woman may be affected by a hostile environment as does the reasonable woman standard.

The final case which we analyzed, Hastings v. Hancock,²⁶⁴ came from the District Court in Kansas. In Hastings, a hairstyling student brought a Title IX suit alleging that she was sexually harassed by one of her teachers at the school she was attending.²⁶⁵ The issue before the court was when an employer becomes liable for the sexually harassing acts of an employee under Title IX.²⁶⁶

The defendant's argued that the employer should not be liable for this type of conduct under agency principles

²⁶⁴ 842 F.Supp 1315 (D.Kan. 1993).

²⁶⁵ Id.

²⁶⁶ Id. at 1317.

because it is outside the scope of the employee's authority.²⁶⁷ The district court in Hastings disagreed because, based upon this reasoning, no employer would ever be liable for the acts of a sexually harassing employee because sexually harassing acts are always outside the scope of an employee's authority.²⁶⁸

The district court in Hastings instead chose to find liability on the part of the employer in the Restatement (Second) of Agency s 219(2)(d), or the agency relationship aiding the harasser which states that an employer may still be liable for the acts of an employee even if the acts fall outside the scope of the employees authority if the employee purported to act on behalf of the employer and there was reliance on that apparent authority.²⁶⁹

It is unclear how such a holding would affect Title IX and instances of student-to-student sexual harassment because students are not agents of the educational institution where they attend. Therefore, their individual acts could not be purported to the institution. However, administrators and faculty members are employees/agents of the institutions and their failure to take steps to halt

²⁶⁷ Id. at 1318 quoting Floyd, 831 F.Supp. 867, 876 (M.D.Ga. 1993).

²⁶⁸ Id. at 1319 quoting Hicks Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987) at 1417-18.

²⁶⁹ Id.

existing sexual harassment may be imputed to the institution.

Summary

Research Question 1 was posed as follows: Sexually harassing conduct by co-workers is prohibited by Title VII of the Civil Rights Act of 1964 because it is sex discrimination. Through the analysis of appropriate federal legislation and federal case law, what argument can be made that student-to-student sexual harassment is sex discrimination which should be prohibited by Title IX of the Education Amendments of 1972? A careful analysis of the previous cases, which span over thirteen years, has showed that the substantive case law concerning Title IX has expanded as knowledge of the sociological ramifications of sexual harassment have surfaced.

As Table 1 (below) shows, from almost the first sexual harassment case occurring in the educational arena, Title IX has been inextricably intertwined with Title VII.²⁷⁰ With each new Title IX case, there appeared to be an evolution of the substantive law regarding sexual harassment. Often this maturation of Title IX law as it pertained to the educational setting followed some new or different

²⁷⁰ Alexander v. Yale, 631 F.2d 178 (2nd. Cir. 1980), Moire v. Temple University School of Medicine, 613 F.Supp. 1360 (E.D.Pa. 1985), Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988), Bougher v. University of Pittsburgh, 882 F.2d 74 (3rd Cir. 1989), Patricia H. V. Berkeley Unified School District, 830 F.Supp. 1288 (N.D.Ca. 1993), Hastings v. Hancock, 842 F.Supp. 1315 (D.Kan. 1993).

progression regarding the substantive nature of Title VII and, in the end, most judicial circuits have chosen to follow the substantive patterns set forth in Title VII decisions when assessing Title IX claims. Clearly the law has been extended to embrace the educational setting; and sexual harassment of students by professors and administrators is remediable. So is sexual harassment by peers in the workplace. The next step of protection, that of a legal remedy for victims of student-to-student sexual harassment has not yet been taken, but is knocking on the door.

Chapter V will, therefore, address Research Question 2 by analyzing the cases again with respect to MacKinnon's theories of dominance, inequality and sexual harassment as sex discrimination to determine whether these theories support an expansion of the substantive law regarding Title IX to include a judicible claim for student-to-student sexual harassment under Title IX.

Table 1

Table of Applicable Federal Cases Alleging Environmental Sexual Harassment

Case Summaries		
Case	Date	Holding
Alexander v. Yale (Second Circuit) Education	1980	<u>Quid pro quo</u> sexual harassment is actionable under Title IX but will not extend to "imponderables" such as atmosphere. Faculty-to-student harassment.
Moire v. Temple Univ. (D.C. Pa.) Education	1985	Recognized existence of hostile environment sexual harassment in higher education and acknowledged that even though sexual harassment "doctrine" had been developed in context of Title VII, it was equally applicable to Title IX. Faculty-to-student harassment.
Meritor v. Vinson (U.S. Supreme Court) Workplace	1986	Sexual harassment which created a hostile environment was sex discrimination actionable under Title VII. Supervisor-to-employee harassment.
Rabidue v. Osceola (Sixth Circuit) Workplace	1986	Sexually-oriented posters did not create a hostile environment and had minimal effect on work environment in the context of a society which condones sexual exploitation in public. Noteworthy dissent mentions the reasonable woman standard for the first time. Supervisor-to-employee harassment.

Table 1--continued

Lipsett v. Univ. P.R. (First Circuit) Education/Workplace	1988	Reiterated parallel between Title VII and Title IX. Summarized prima facie case for <u>quid pro quo</u> and hostile environment sexual harassment. Mentioned importance of keeping male and female perspectives in mind when weighing facts. Stated that plaintiff could have pursued a claim against harassing "fellow residents" under Title IX. An institution is liable for hostile environment sexual harassment created by a supervisor if they knew of the harassment and failed to take appropriate steps to stop it. Supervisor/Faculty-to-employee/student harassment.
Bougher v. U. of Pitt. (Third Circuit) Education	1989	Court failed to find that the hostile environment principles established under Title VII apply to sex discrimination cases in education. Faculty-to-student harassment.
Ellison v. Brady (Ninth Circuit) Workplace	1991	In opposition to Rabidue stated that conduct of harasser must be "severe or pervasive," not the alteration of environment. Psychological well-being must not be affected to the point of debilitation to support a claim of harassment. Court should use reasonable woman standard in weighing facts because reasonable

Table 1--continued

Franklin v. Gwinnett (U.S. Supreme Court) Education	1992	person standard tends to be male-biased and ignore the experiences of women. Employee-to-employee harassment.
Patricia H. v. Berkeley (N.D.Cal.) Education	1993	Title IX may support a claim for monetary relief despite failure of statute to authorize such an award. Faculty-to-student harassment.
Doe v. Petaluma City (N.D.Cal.) Education	1993	Student could bring a hostile environment claim under Title IX. Despite the fact that Title IX was modeled after Title VI, the court relied on case law developed for Title VII because the same type of conduct is prohibited by both Title VII and Title IX. The court suggested that a higher standard of conduct be placed upon a faculty member when dealing with students because of the degree of trust and dependency which does not inherently exist in the workplace. Faculty-to-student harassment.
Doe v. Petaluma City (N.D.Cal.) Education	1993	In cases of hostile environment sexual harassment, it is not enough that administrators knew or should have known of the harassment and failed to take appropriate steps to stop it. Administrators must intentionally discriminate against the student based on his/her sex. Student-to-student harassment.

Table 1--continued

Harris v. Forklift Sys. 1993
(U.S. Supreme Court)
Workplace

Supreme Court overruled a district court opinion which followed the reasoning in Rabadue. Supreme Court stated that the hostility of an environment can depend upon a number of things such as frequency of conduct or severity, however, all of the factors need not be present to sustain a claim of hostile environment sexual harassment. Supervisor-to-employee harassment.

Hastings v. Hancock 1993
(D.Kan.)
Education

Agency principles do not protect an employer from liability for sexual harassment perpetrated by an employee because such acts are outside the employee's scope of employment. If that were the case, a victim would never be able to recover. Following the Tenth Circuit, the instant court stated that an employer may be liable for the acts of its employees acting outside the scope of employment if the employee professed to act on behalf of the employer and there was reliance on that apparent authority.

CHAPTER V
ANALYSIS USING MACKINNON'S THEORIES OF DOMINANCE, INEQUALITY
AND SEXUAL HARASSMENT AS SEX DISCRIMINATION

MacKinnon's theories of dominance and inequality capture the subtle power differences which exist between males and females,¹ even when those males and females might be classified as peers such as classmates on the college campus. Through her dominance framework, MacKinnon has tried to show a legal system that has, for most of its existence, viewed laws from a masculine perspective which has led to a dominant male society sanctioned by law.² MacKinnon's inequality theory is used as the basis for her legal argument that the different treatment of men and women at law based on the social subordination of women to men is a violation of civil rights which should be prohibited.³ MacKinnon's research has offered evidence that sexual harassment is a form of sex discrimination which is rooted in the unequal power distribution between men and women in

¹ Christine A. Littleton, "Equality and Feminist Legal Theory," University of Pittsburgh Law Review 48 (1987): 1045-47.

² Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (New Haven: Yale University Press, 1979): 7.

³ Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and the Law (Cambridge: Harvard University Press, 1987): 43.

society.⁴ The Ellison court was the first to recognize institutional liability for the sexual harassment of a female employee by a male co-worker as a form of sex discrimination.⁵

Chapter V will focus on case analysis as it relates to MacKinnon's theories and, in particular, whether any judicial reasoning can be discerned from the analyzed cases that would suggest that the legal system has accepted MacKinnon's theory of sexual harassment as a form of sex discrimination. This acceptance coupled with sexual harassment case law and current sociological research on student-to-student sexual harassment will lead to conclusions in Chapter VI concerning whether future judicial reasoning may be willing to accept the legal argument that student-to-student sexual harassment is a form of sex discrimination which should be prohibited by Title IX.

Based on the cases analyzed, three prominent legal issues related to MacKinnon's theories emerged. These issues were: (1) whether or not the legal principles established in sexual harassment cases under Title VII could be applied to the sexual harassment cases brought under Title IX; (2) the type of psychological damage a plaintiff was required to have suffered in order to recover for

⁴ See generally, MacKinnon, Feminism Unmodified and Sexual Harassment.

⁵ Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

hostile environment sexual harassment; and (3) whether the reasonable woman standard was accepted as a viable alternative to the reasonable person standard when assessing the damage a plaintiff has suffered as a result of exposure to a hostile environment.

Applicability of Title VII Principles to Title IX Cases

Alexander v. Yale University⁶ was the first sexual harassment case brought by students under Title IX. In this instance, the Second Circuit did acknowledge that Title IX was the appropriate avenue for redress for claims of quid pro quo sexual harassment in education, however, a plaintiff could only recover for a "distinct and palpable injury" which has led to the "deprivation of educational benefits."⁷ The Second Circuit failed to recognize the harm from such "imponderables"⁸ as atmosphere. The opinion in this case regarding the type of sexual harassment, namely quid pro quo, which led to recovery was in keeping with the general judicial reasoning of the time. At this point, MacKinnon's theories had not been fully developed and it was not until

⁶ 459 F.Supp. 1 (D.Conn. 1977), aff'd, 631 F.2d 178 (2d Cir. 1980).

⁷ Id. at 184.

⁸ Id. at 182.

the Meritor case in 1986 that courts accepted the concept of harm from a work environment polluted by sexual harassment.⁹

Five years later the next Title IX case was brought by a plaintiff for sexual harassment in an educational setting. In Moire v. Temple University School of Medicine,¹⁰ the District Court for the Eastern District of Pennsylvania held that the plaintiff failed to provide evidence to show that she had been subjected to a hostile environment during her third year of medical school.¹¹ Although the plaintiff was unsuccessful in proving her case, the Moire court showed a willingness to accept a less traditional view concerning sexual harassment. In its opinion, the Moire court actually relied on the definition of sexual harassment used by MacKinnon in her book Sexual Harassment of Working Women: A Case of Sex Discrimination which had been published in 1979.¹²

The district court in Moire did acknowledge the harm to a victim as a result of quid pro quo sexual harassment, as

⁹ MacKinnon was co-counsel for the plaintiff in the Meritor case and wrote the brief which was presented at the appellate level trial. In Meritor, the Supreme Court acknowledged, for the first time, that hostile environment sexual harassment was legally actionable under Title VII. See Holly B. Fechner, "Toward an Expanded Conception of Law Reform: Sexual Harassment Law and the Reconstruction of Facts," Journal of Law Reform 23, no. 3 (Spring 1990): 476.

¹⁰ 613 F.Supp. 1360 (E.D.Pa. 1985), aff'd, 800 F.2d 1136 (3d Cir. 1986).

¹¹ Id. at 1377.

¹² Id. at 1366.

did the court in Alexander,¹³ but in the instant case, the court went one step further. The Moire court recognized the existence of a hostile environment which occurs when harassing behavior is so offensive that it violates a victim's civil rights.¹⁴ It is likely that the instant court's willingness to accept the notion of the hostile environment came from the recognition of MacKinnon's work on sexual harassment as a watershed mark for the expansion of judicial theory regarding sexual harassment as sex discrimination referred to in the court opinion.¹⁵

In addition, the district court in the instant case explicitly stated in a footnote that even though sexual harassment "doctrine" had been more clearly developed with regard to Title VII, the guidelines were equally applicable to Title IX.¹⁶ This observation may stem as well from the instant court's recognition of MacKinnon's ideas as legally valid. Even though her book¹⁷ was written in the context of the workplace, her concept of sexual harassment as an abuse of power in a relationship could be equally applicable in the educational setting where similar relationships might

¹³ 631 F.2d 178 (2d Cir. 1980).

¹⁴ Moire at 1366.

¹⁵ Id.

¹⁶ Id. at 1367 fn.2.

¹⁷ Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (New Haven: Yale University Press, 1979).

exist between professors and students as they existed in the workplace between employers and employees.

Another case which relied on the applicability of Title VII principles to Title IX cases was Lipsett v. University of Puerto Rico.¹⁸ In Lipsett, the First Circuit failed to find that plaintiff, a surgical resident, had suffered from hostile environment sexual harassment.¹⁹ The First Circuit relied on Mabry²⁰ which reasoned that "[b]ecause Title VII prohibits the identical conduct prohibited by Title IX, i.e. sex discrimination, it would suggest that Title VII is the most appropriate analogue when defining Title IX's substantive standards. . . ."²¹ The Lipsett court's reference to a House Report discussing both Title VII and Title IX provided further evidence for the instant court that congressional intent supported applying Title VII principles to Title IX case law.²²

The First Circuit, however, may have been more willing to apply Title VII principles to this Title IX case because of the plaintiff's employee/student status as a surgical

¹⁸ 864 F.2d 881 (1st Cir. 1988).

¹⁹ Id.

²⁰ Mabry v. State Bd. of Community Colleges and Occupational Educ., 813 F.2d 311 (10th Cir. 1986), cert. denied, 484 U.S. 849, 108 S.Ct. 148, 98 L.Ed.2d 104 (1987).

²¹ Lipsett quoting Mabry, 813 F.2d 311, 316 fn.6.

²² See supra note 88.

resident.²³ If the plaintiff were a medical student and not a resident, it seems that the court might have been more reluctant to apply Title VII principles and may, in fact, have declined to apply them at all in the instant case. The First Circuit did mention plaintiff's failure to include her co-residents as defendants in the lawsuit²⁴ but this recognition most likely stemmed from the residents' status as co-workers, not co-students.

In apparent contrast to the above cases, Bougher v. University of Pittsburgh,²⁵ in which plaintiff was unable to prove her prima facie case of sexual harassment, portrayed a judiciary unwilling to go beyond the explicit congressional directive contained in Title IX. The Bougher court failed to find that the hostile environment theory established under Title VII was applicable to Title IX cases because Congress did not provide for such application in the text of Title IX.²⁶

Additionally, the Supreme Court in Franklin v. Gwinnett County Public Schools,²⁷ which held that a school district was liable for monetary damages brought to enforce

²³ Lipsett at 897.

²⁴ Id. at 895.

²⁵ 713 F.Supp. 139 (W.D.Pa. 1989), aff'd, 882 F.2d 74 (3d Cir. 1989), cert. denied, 108 S.Ct. 460 (1987).

²⁶ Id. at 77.

²⁷ 911 F.2d 617 (11th Cir. 1990), rev'd, 112 S.Ct. 1028 (1991), 117 L.Ed.2d 208 (1992).

Title IX, agreed with the Eleventh Circuit's opinion that failed to apply Title VII principles to this Title IX case.²⁸ The lower court came to this conclusion because the statutory language of Title IX referred to conditional grants which may be terminated if discrimination occurred, whereas, Title VII discusses "outright prohibitions" which make discrimination in employment an unlawful practice.²⁹ The lower court stated that applying Title VII to Title IX would not result in "the kind of orderly analysis so necessary in this confusing area of the law."³⁰ The Supreme Court concurred.³¹

In one of the more recent Title IX cases, Patricia H. v. Berkeley Unified School District,³² plaintiff succeeded in proving that an actionable hostile environment was created by the presence of a teacher in the same school as children he had sexually abused.³³ In Patricia H., the court acknowledged that the issue of a hostile environment in the educational setting was a novel question in that district; however, the court was not without guidance in

²⁸ Id.

²⁹ Id., 911 F.2d 617 at 622.

³⁰ Id.

³¹ Id., 112 S.Ct. 1028 at 1032.

³² 830 F.Supp. 1288 (1993).

³³ Id.

that area.³⁴ The district courts stated that although Title IX was patterned after Title VI, because Title IX prohibits the same conduct as Title VII, it is appropriate for the instant court to turn to Title VII substantive case law for guidance as well.³⁵ The court went on to hold that there is a clear parallel between academic advancement based upon submission to sexual demands in the educational setting and job promotion based upon submission to sexual demands in the workplace.³⁶

Hastings v. Hancock,³⁷ in which the District Court of Kansas failed to grant a summary judgement to defendant for alleged sexual harassment perpetrated by a hairstyling school's director, is yet another instance where a court applied the Title VII principles established in the workplace concerning sexual harassment to this Title IX case.³⁸

Hostile Environment

MacKinnon contends, through her dominance framework, that there are social injustices which arise because of the devaluation of anything associated with women.³⁹ A major

³⁴ Id. at 1290.

³⁵ Id.

³⁶ Id. at 1290-91.

³⁷ 842 F.Supp. 1315 (D.Kan. 1993).

³⁸ Id.

³⁹ Littleton, "Feminist Legal Theory," at 1046.

goal of MacKinnon's inequality theory is to ensure that the legal system acknowledges that women have suffered harm as a result of sexual harassment and that even though this harm may often affect women differently than men, it does not make the injury any less palpable for those women.⁴⁰ The legal recognition of the harm suffered as a result of sexual harassment has overtly manifested itself in the cases analyzed with the issue of psychological harm or, in other words, how hostile does an environment have to be to recover for harm caused by sexual harassment? This issue was addressed in the cases which follow.

Meritor v. Vinson,⁴¹ the Supreme Court case that first recognized a hostile environment as actionable sexual harassment, had as its crux the issue of whether or not Congress intended psychological harm to be admissible as evidence of sex discrimination or whether the only admissible evidence was loss of tangible job benefits such as wage loss.⁴² The Supreme Court held that the Title VII phrase "terms, conditions, or privileges of employment" referred to more than tangible job benefits.⁴³ For guidance, the Supreme Court relied on a sexual harassment

⁴⁰ MacKinnon, Feminism Unmodified, 110.

⁴¹ 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (per curiam), aff'd, Vinson v. Taylor, 753 F.2d 141 (1985).

⁴² Id. at 2404.

⁴³ Id.

case from the Fifth Circuit which was sensitive to the emotional or psychological stability which could be destroyed by an environment polluted by discrimination, racial, sexual or otherwise.⁴⁴

The Meritor court also followed the interpretation of Title VII statutory regulations in the EEOC Guidelines which maintained the view that Title VII supports noneconomic injury as well as economic.⁴⁵ Meritor also cited Henson v. Dundee⁴⁶ which stated that the environment created by sexual harassment is every bit as demeaning and harmful as that suffered by racial harassment.⁴⁷ The Henson court went on to state that no person should have to "run a gauntlet of sexual abuse" for the privilege of being allowed to work.⁴⁸

While the Supreme Court did rule in favor of the actionability of a hostile environment, the Court was silent as to how severe the sexual harassment must be in order to create an environment which was hostile. According to Rogers and Henson, the harassing conduct must be

⁴⁴ Id. at 2405 quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972).

⁴⁵ Id. at 2404.

⁴⁶ 682 F.2d 897 (11th Cir. 1982).

⁴⁷ Id. at 902.

⁴⁸ Id.

sufficiently severe or pervasive so as "to alter the conditions of [the victim's] employment."⁴⁹

The Ninth Circuit followed the judicial reasoning of both the Rogers and Henson courts in Ellison v. Brady⁵⁰ stating that it is the conduct of the harasser which must be severe or pervasive, not the alteration in the condition of employment.⁵¹ In Ellison the Ninth Circuit held an employer liable for the sexually harassing conduct of a co-worker.⁵² The court went on to state that "employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation."⁵³ The Ninth Circuit reasoned that while one epithet might not be enough to create a hostile environment, the protections afforded by Title VII come into play before the victim of the sexual harassment must resort to psychiatric assistance.⁵⁴

With the case of Harris v. Forklift Systems, Inc.⁵⁵ the Supreme Court finally addressed the issue of how abusive an

⁴⁹ Meritor at 2405 quoting Rogers and Henson.

⁵⁰ 924 F.2d 872 (9th Cir. 1991).

⁵¹ Id. at 878.

⁵² Id. at 872.

⁵³ Id. at 878.

⁵⁴ Id.

⁵⁵ 114 S.Ct. 367 (1993).

environment must be in order to be give rise to a claim for hostile environment under Title VII.⁵⁶

Reasonable Woman Standard

At the heart of MacKinnon's dominance theory is her belief that "maleness" has set the standard in society which we all are measured against.⁵⁷ According to MacKinnon, such standards have naturally led to a male-biased perception in the legal system, for example, the reasonable man standard.⁵⁸ MacKinnon proposed her theory of inequality to counter this reality in the legal system by showing courts that women have had different experiences than men which may cause them to react differently than men.⁵⁹ In other words, the reasonable man may not actually take into account that what is reasonable behavior for a man might be different than reasonable behavior for a woman who has had different life experiences.

Rabidue was the first case to address the concept of the reasonable woman standard.⁶⁰ In his dissent, Judge Keith pointed out that the reasonable man/person standard

⁵⁶ Id.

⁵⁷ Catharine A. MacKinnon, "Legal Perspectives on Sexual Difference," 219, in Theoretical Perspectives of Sexual Difference, Deborah L. Rhode ed. (New Haven: Yale University Press, 1990).

⁵⁸ Ibid.

⁵⁹ MacKinnon, Feminism Unmodified, 110.

⁶⁰ 805 F.2d 611 (6th Cir. 1986).

failed to take into account the differences in appropriate sexual conduct between men and women.⁶¹ He went on to state that failing to adopt the perspective of the "reasonable victim" would permit courts to "...sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men."⁶² Although the plaintiff did not prevail in this case, Judge Keith's dissent did offer new information for future courts to consider when ruling on cases of sexual harassment.⁶³

Ellison was the first case in which a plaintiff prevailed on a claim of co-worker sexual harassment.⁶⁴ In this case, the court focused on the perspective of the

⁶¹ Id. at 626.

⁶² Id.

⁶³ One year later the First Circuit, in Lipsett, reiterated Judge Keith's comments when they mentioned the importance of keeping in mind both men's and women's perspectives. Lipsett, 864 F.2d 881 (1st Cir. 1988). Although the plaintiff did not prevail in Lipsett either, such a case gives a clear example of how judicial opinions in one region may influence judicial opinions in another. In Robinson v. Jacksonville Shipyards Inc., 760 F.Supp. 1486 (M.D.Fla. 1991), three years after Lipsett, the District Court for the Middle District of Florida held that a plaintiff had been subjected to hostile environment sexual harassment. In reaching their conclusion, the court stated that the objective standard to be used was whether a reasonable person of the plaintiff's sex, female, would perceive that an abusive working environment had been created. Id. at 1524. Clearly, the district court in Robinson was using the 'reasonable woman' as their objective standard.

⁶⁴ 924 F.2d 872 (9th Cir. 1991).

victim as the Rabidue dissent had urged.⁶⁵ The court stated that there are many common concerns among men and women, however, many women share concerns which men might not.⁶⁶ The court used the case of sexual assault as an example. The court reasoned that because women are disproportionately the victims of sexual assault, a victim of sexual harassment might have reason to suspect that such conduct is a prelude to sexual assault and so perceive the harassment as something more sinister than perhaps it was intended by the man.⁶⁷

Findings Related to Question 2

Research Question 2 of the study was posed as follows: How do MacKinnon's theories of dominance, inequality and sexual harassment as a form of sex discrimination provide the theoretical means necessary to show that student-to-student sexual harassment is sex discrimination that should be prohibited by Title IX of the Education Amendments of 1972?

There is evidence from case law that MacKinnon's legal theories regarding sexual harassment as sex discrimination have been adopted by a number of courts as cited in cases such as Meritor, Rabidue, Ellison and Harris. It is likely that judicial recognition of a hostile environment has its

⁶⁵ Id. at 878.

⁶⁶ Id. at 879.

⁶⁷ Id.

roots in MacKinnon's work on dominance, inequality and sex discrimination. Court have since expanded this reasoning to include hostile environments that are created by co-workers as well as hostile environments created by professors or administrators in the educational setting.

CHAPTER VI CONCLUSIONS AND RECOMMENDATIONS

The purpose of this study was to examine existing sexual harassment statutes to determine if any of them provided a legal remedy to victims of student-to-student sexual harassment in higher education institutions. If current legal statutes were found not to extend such a remedy, a second purpose was to explore the expansion of present legal theories affording protection against sex discrimination to include student-to-student sexual harassment, through Catharine MacKinnon's theories of dominance, inequality and sex discrimination.

The research questions addressed the appropriateness of applying legal principles established under Title VII with regard to co-worker harassment to Title IX in cases of student-to-student sexual harassment, and whether MacKinnon's theories provided evidence to show that student-to-student sexual harassment was sex discrimination which should be prohibited by Title IX. The legal analyses contributed to the conclusions and recommendations presented in this chapter.

Conclusions Based on the Legal Analysis

The judiciaries's acceptance of a legal parallel between Title VII and Title IX leads to some logical corollaries for cases of sexual harassment in education. If courts recognize both quid pro quo and hostile environment sexual harassment in the workplace under Title VII, it follows that they can do so in the educational setting under Title IX. Additionally, if a victim of sexual harassment can bring a claim against an employer or a co-worker in the workplace, it follows that a student should be able to bring a claim against a professor/administrator or a classmate. While students have broken the barriers against bringing and prevailing in a Title IX claim against a teacher,¹ no student has yet prevailed in a Title IX claim against another student.²

In Alexander v. Yale³ the Second Circuit concluded that quid pro quo sexual harassment was sex discrimination in education and a violation of Title IX. However, Second Circuit failed to expand the legislative language to cover such "imponderables" as an abusive environment.⁴

¹ Patricia H. v. Berkeley Unified School District, 830 F.Supp. 1288 (N.D.Cal. 1993).

² Jane Doe v. Petaluma City School District, 830 F.Supp. 1560 (N.D.Cal. 1993).

³ 631 F.2d 178 (2nd Cir. 1980).

⁴ Id. at 182.

Moire v. Temple University School of Medicine⁵ recognized for the first time in the educational setting that the existence of a hostile environment was sexual harassment and actionable under Title IX. The court explicitly stated, albeit in a footnote, that although sexual harassment "doctrine" had developed in the context of Title VII, the established guidelines were equally applicable to Title IX.⁶ The Moire court actually relied on the definition of sexual harassment used by Catharine MacKinnon in her book Sexual Harassment of Working Women: A Case of Sex Discrimination which gave evidence that at least some judicial districts were relying on current sociological and legal research as well as legislative commentary and existing case law when making their decisions.

The Supreme Court holding in Meritor Savings Bank, FSB v. Vinson⁷ signified the end to differences in opinion among the lower courts as to whether or not a hostile environment was actionable sexual harassment when it recognized such harassment as violative of Title VII.

While the majority in Rabidue v. Osceola Refining Company⁸ seemed to be setting narrow parameters on what types of conduct do create a hostile environment, the

⁵ 613 F.Supp. 1360 (E.D. Pa. 1985).

⁶ Id. at 1367.

⁷ 106 S.Ct. 2399 (1986).

⁸ 805 F.2d 611 (6th Cir. 1986).

dissenting opinion introduced, for the first time, the possibility of using a reasonable woman standard to assess whether harm was caused by sexually harassing conduct.

The next Title IX case, Lipsett v. University of Puerto Rico⁹ reiterated the parallel between Title VII and Title IX which had first been drawn by Moire.¹⁰ Lipsett summarized the prima facie cases for proving both quid pro quo and hostile environment sexual harassment.¹¹ Although the First Circuit did not discuss the reasonable woman standard, it did mention the importance of keeping both the male and female perspectives in mind when appraising claims of sexual harassment.¹² When evaluating institutional liability, the First Circuit determined that an institution is liable for hostile environment sexual harassment perpetrated by a supervisor if the institution had knowledge of the harassment and failed to take appropriate steps to halt it.¹³

An interesting point from Lipsett was a reference made by the majority opinion. The judges stated that even though the plaintiff in Lipsett did not choose to do so, she could have brought a claim against her fellow residents for their

⁹ 864 F.2d 881 (1st Cir. 1988).

¹⁰ 613 F.Supp 1360.

¹¹ Id. at 897.

¹² Id. at 898.

¹³ Id. at 901.

harassing conduct under Title IX.¹⁴ While it is likely that the court was so liberal in their interpretation of Title IX because medical residents are employees, they are also students. If Lipsett would have brought such a claim against her fellow residents and been successful, perhaps the plaintiff in Doe v. Petaluma City School District¹⁵ would have had an easier time proving her claim.

The court in Bougher v. University of Pittsburgh¹⁶ decided to abide by a strict interpretation of Title IX which did not make reference to Title VII. In spite of the lower court ruling in Moire which recognized hostile environment sexual harassment as violative of Title IX and the applicability of case law established for Title VII to Title IX cases,¹⁷ the Bougher court failed to find that hostile environment principles established under Title VII could be applicable to Title IX cases.¹⁸ Apparently, the Bougher court was not willing or ready to extend the Supreme Court's ruling in Meritor to cases existing in the educational sphere.

The next workplace sexual harassment case brought under Title VII that may effect the outcome of future Title IX

¹⁴ Id. at 895.

¹⁵ 830 F.Supp. 1560 (N.D.Ca. 1993).

¹⁶ 882 F.2d 74 (3rd Cir. 1989).

¹⁷ 613 F.Supp 1360 (E.D. Pa. 1985).

¹⁸ Bougher at 77.

sexual harassment cases was Ellison v. Brady¹⁹ in which the Ninth Circuit chose to embrace the judicial reasoning of the dissenting opinion in the Sixth Circuit's Rabidue²⁰ decision as opposed to the majority. The Ellison court, which focused for the first time on co-worker harassment as opposed to harassment by a supervisor, concluded that when assessing the hostile nature of an environment, it is the conduct of the harasser that must be "severe or pervasive," not the alteration of the environment.²¹ In addition, the employee must not suffer to the point of debilitation in order to recover for harm caused by sexual harassment.²²

Perhaps most importantly, the Ellison court concluded, like Judge Keith in Rabidue,²³ that the reasonable woman standard should be used by courts when weighing facts in sexual harassment cases because the reasonable person standard tends to be male-biased and ignore the experiences of women.²⁴

The next Supreme Court case, Franklin v. Gwinnett County Public Schools,²⁵ was important because it expanded

¹⁹ 924 F.2d 872 (9th Cir. 1991).

²⁰ 805 F.2d 611 (6th Cir. 1986).

²¹ Id. at 878.

²² Id.

²³ Rabidue at 626.

²⁴ Ellison at 879.

²⁵ 112 S.Ct. 1928 (1992).

the remedies available to plaintiff's in sexual harassment cases. The Supreme Court stated that, despite Congress's failure to explicitly state that a monetary remedy was available in Title IX cases, the Court added that federal courts have the jurisdiction to use any available means to remedy a harm.²⁶ Such a holding could have serious implications for an educational institution, especially since sexual harassment is an intentional offense and, therefore, not covered by insurance.

The next two cases which both originated in the Northern District of California are interesting in that they tend to show where that district is willing to draw the line for recovery in sexual harassment claims under Title IX. In Patricia H. v. Berkeley Unified School District,²⁷ the district court held that not only should the judiciary look to Title VII cases for assistance in deciding Title IX claims because the same type of conduct is prohibited by both statutes,²⁸ but that a higher standard of conduct should be imposed in the educational setting because of the high degree of trust and dependency which exists between

²⁶ Franklin at 1033 quoting *Bell v. Hood*, 66 S.Ct. 773.

²⁷ 830 F.Supp. 1288 (N.D.Ca. 1993).

²⁸ *Id.* at 1290.

faculty member and student which does not inherently exist between employer and employee.²⁹

In Doe v. Petaluma City School District,³⁰ which addressed the issue of student-to-student sexual harassment for the first time in a court case, the district court was unwilling to find a violation of Title IX on the part of the school district. In the instant case, the district court stated that not only must an institution know of the harassment and fail to take appropriate steps to halt it, the plaintiff must prove that the institution failed to take the necessary steps because of the plaintiff's sex.³¹ That is a higher standard than is currently required of employees in the workplace.³² It appears that in this judicial district, at least, the court was unwilling to extend recovery for sexual harassment under Title IX to instances of student-to-student sexual harassment.

In Harris v. Forklift Systems, Inc.,³³ the Supreme Court concluded, once and for all, that a plaintiff need not suffer harm which seriously affects the psychological well-being of a plaintiff in order to recover damages for sexual

²⁹ Id. at 1293.

³⁰ 830 F.Supp. 1560 (N.D.Ca. 1993).

³¹ Id. at 1571.

³² "Courts Affirm Title IX Coverage of Hostile Environment Sexual Harassment," About Women on Campus 3, No. 1 (Winter, 1994): 2-3.

³³ 114 S.Ct. 367 (1993).

harassment stemming from a hostile environment. Justice O'Connor, writing for a unanimous court, stated that there are a number of factors which can be considered when assessing whether a plaintiff was harmed by a hostile environment such as severity or frequency of conduct and one or all of these may be present.³⁴ In other words, just because one of these many factors may not be present, it would not preclude a plaintiff from recovery. This holding by the Supreme Court unified the various opinions held by judicial districts across the country concerning the degree of mental anguish a plaintiff must suffer via a hostile environment and ultimately made it easier for plaintiffs to meet their burden of proof.

Hastings v. Hancock³⁵ seemed to provide additional hope for plaintiffs trying to recover for harm caused by sexual harassment. The Hastings court concluded that an institution could not hide behind agency principles as a defense to sexual harassment because sexually harassing conduct is always outside the scope of any supervisor's job description and so a plaintiff would never be able to recover under those conditions.³⁶ The Hastings court held that an institution may be held liable if the sexually harassing employee purported to act on behalf of the

³⁴ Id. at 371.

³⁵ 842 F.Supp. 1315 (D.Kan. 1993).

³⁶ Id. at 1319.

institution and the plaintiff relied on that apparent authority.³⁷

Based on these cases which span over thirteen years, the case law concerning Title IX has expanded as knowledge of sociological ramifications of sexual harassment have surfaced. Title IX has been inextricably intertwined with Title VII and, in the end, most judicial districts have chosen to follow the substantive patterns set forth in Title VII decisions when assessing Title IX claims. As knowledge concerning the harmful effects of sexual harassment by any perpetrator increases and the additional case law involving Title VII, which seems to precede Title IX in evolution, is handed down, it is predictable that judicial reasoning regarding Title IX will have to expand to reflect public sentiment as well as precedent judicial conclusions.

Conclusions Based on MacKinnon's Theories

MacKinnon's theories offered those in the legal arena a new way to look at the legal system and the cases being analyzed within it. Through her use of sociological research combined with the sometimes daily reality of sexual harassment for women in the workplace, her brief in the Meritor case succeeded in persuading the court to accept the existence of a hostile environment in the workplace.

When the first sexual harassment case in education, Alexander, was decided, MacKinnon's theories had not yet

³⁷ Id. at 1320.

been fully developed. Yet, over time, courts began to mold the statutory language of both Title VII and Title IX so that it responded to the changes which occurred in society manifested in the workplace and in the educational setting.

The Moire court used MacKinnon's definition of sexual harassment from her book Sexual Harassment of Working Women: A Case of Sex Discrimination. With a more conclusive set of facts, it could be conjectured that the plaintiff in this case may have succeeded in proving her case. In any event, the mention of MacKinnon's work tends to show that the court may have been considering applying the principles she had established.

MacKinnon's efforts were again recognized in the Meritor case. Based largely on the brief written by MacKinnon, the Supreme Court accepted the hostile environment theory for the first time. In an effort to look at the totality of circumstances in the instant case, the Supreme Court did mention employee's dress. Any evidence of provocative dress might provide evidence that the behavior alleged to be sexual harassment may not have been unwelcome at all. The Court's mention of clothing seemed to suggest that, at this point, the Court was comfortable with some new interpretations of anti-sex discrimination statutes, while still holding to some traditional notions and myths about sexual harassment. The Court may have still viewed sexual

harassment as sex, not power, an idea with which MacKinnon would disagree.

Judge Keith's dissenting opinion in Rabidue seemed to move further down the evolutionary path of Title VII. Judge Keith never mentioned Catharine MacKinnon, per se, in his passionate plea to use the reasonable woman standard when assessing harm in sexual harassment cases. However, his opinion showed evidence of someone familiar with sociological, psychological and physiological ramifications of sexual harassment on a victim much like MacKinnon had done. Keith's ideas, which were in conjunction with MacKinnon's theories, were reflective of evolving law and feminist legal theory which had been gaining popularity. Given the fact that MacKinnon's legal writings on her theories of sexual harassment were chronological contemporaries of the Rabidue opinion, perhaps Keith was familiar with her work and that his recommendation to view occurrences from the female perspective flowed from MacKinnon's dominance and inequality theories.

In Ellison, the plaintiff prevailed in a sexual harassment suit perpetrated by a co-worker. The appellate court used reasoning similar to the Rabidue dissent. The court referred to statistics which showed that women were overwhelmingly the victims of sexual assault and concluded, therefore, that women may have a different outlook concerning sexual harassment than men.

With the Harris case, the Supreme Court settled the question of how psychologically harmed a plaintiff must be in order to meet that burden of proof in a sexual harassment trial. The Court concluded that a number of factors could be considered but that no one particular factor need to be present in order to prevail in a sexual harassment suit. Such a holding would seem to be in line with MacKinnon's theories and her belief about the judicial system's historical devaluation of issues associated with women, for example, sexual assault.

Originally, sexual assault was punished because it interfered with the patrilineal line of descendants, not because it caused physical or psychological harm to women. Later, the legal system evolved so that consent became a defense to sexual assault. In other words, if a defendant believed the victim had consented, the court ruled that no sexual assault had occurred and, therefore, no harm had been done to the woman. The Harris decision provided credence to the harm women suffered because of sexual harassment by allowing the plaintiff to recover for harm even though she had not suffered a complete mental breakdown.

Patricia H. and Jane Doe cases are important in that they came from the same judicial district and were decided within a month of each other. However, their opinions seemed to send different messages to the district. Patricia H. was decided in favor of the plaintiff based on the strong

fiduciary relationship which exists between student and teacher. The court stated that this relationship is more intimate and, therefore, more fragile than that of employer and employee. For that reason, the court stated, there should be an even higher standard placed on the conduct of teachers to prevent sexual harassment from occurring.

In Jane Doe, the court refused to hold a school district liable for the sexual harassment of a student perpetrated by other students even though the school knew it was occurring and took no steps to halt it. The difference between these two cases is that one case dealt with the issue of teacher/student sexual harassment and one case dealt with student-to-student sexual harassment representing the threshold at which the courts are now poised in reference to whether or not they can or will recognize this particular type of harassment as sex discrimination under federal laws. The theoretical means are available to courts who are so inclined to use them through MacKinnon's theories of dominance, inequality and sexual harassment as sex discrimination. Her concept of sexual harassment as an abuse of power in a relationship could be equally applicable in the educational setting where male students, according to MacKinnon's theories, wield the power in relationships with female students. Much will depend upon the inclination of the courts to use the theories.

It has been demonstrated through case analyses that Title VII principles apply to Title IX cases, and an institution is liable for the sexual harassment perpetrated by a co-worker. The literature has shown that, according to MacKinnon's theories, the judicial system has a history of male-bias and the devaluation of things associated with women. Given the combination of these factors, it is feasible to consider student-to-student sexual harassment a form of sex discrimination in education just as co-worker sexual harassment is considered sexual harassment in the workplace.

Recommendations

While cases of student-to-student sexual harassment may have been decided by the trial courts, as yet, no case has reached the appellate level as evidenced by the fact that there are no cases listed in regional or federal reporters. This lack of case law that is directly on point leaves many unanswered questions in this area and, therefore, many areas to be researched.

1. This study focused on case law which had been decided by the end of the 1993 calendar year. A study that addresses federal sex discrimination case law from 1993 to the present may uncover cases which deal with student-to-student sexual harassment in particular, or, at the least, additional teacher/student or employer/employee case law which may further assist legal analysis of student-to-

student sexual harassment cases or demonstrate a further expansion of the law.

2. As stated in the research, certain states have enacted civil rights statutes to prohibit sexual harassment in the educational setting.³⁸ It would be appropriate to investigate how many states have enacted such legislation and whether these statutes have aided in the prevention of sexual harassment in the educational setting, in particular, student-to-student sexual harassment.

3. Likewise, many college campuses include provisions in their codes of conduct which will ensure the fair and equal treatment of all students. At least one college even refers specifically to student-to-student sexual harassment as a violation of the student code of conduct.³⁹ Research to assess whether such codes do, in fact, deter student-to-student sexual harassment may help prevent the harassment before it occurs.

4. The above research also reveals a number of factors that may affect the frequency and severity of student-to-student sexual harassment on college campuses including, but not limited to, individual attitudes about men and women, miscommunication between men and women and use or abuse of alcohol. It would be valuable to continue to assess individuals' attitudes about sexual harassment and to

³⁸ Supra Chapter I note 64.

³⁹ Supra Chapter I note 22.

measure their general knowledge level concerning sexual harassment and, in particular, student-to-student sexual harassment. It is difficult to combat the problem of student-to-student sexual harassment unless there is an understanding of why it occurs.

5. Because words are enough to create a hostile environment, according to the EEOC, an increasingly heated issue has become the potential conflict between the constitutional right to free speech guaranteed by the First Amendment and the right to governmental protection of civil rights guaranteed by the Fourteenth Amendment. In other words, how much speech is protected, and when does the speech create a hostile environment? This issue becomes important for college campuses, which have traditionally been champions of free speech as long as it is subjected to the time, place and manner restrictions provided in the Constitution.

Additional research in the area of First Amendment versus Fourteenth Amendment rights and which, if any, take precedence may help college campuses determine whether they may place greater restrictions on campus speech by male students that female students may consider sexual harassing without risking a First Amendment violation.

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I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.



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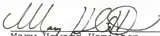
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